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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the District of Columbia Court of Appeals, entered on November 1, 1976, affirming the Opinion and Order of the Superior Court of the District of Columbia which held Section 18-302 of the District of Columbia Code, 1973, to be in violation of the First and Fifth Amendments of the United States Constitution. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the District of Columbia Court of Appeals of November 1, 1976 is reported at 104 Wash. L. Rptr. 2061 (1976) and at 365 A.2d 621: A copy is attached hereto as Appendix A. The Opinion and Order of the Superior Court of the District of Columbia of February 13, 1975 is unreported. A copy is attached hereto as Appendix B.

JURISDICTION

The judgment upon which this appeal is taken was rendered on November 1, 1976, by the District of Columbia Court of Appeals and Notice of Appeal to the Supreme Court of the United States was filed in the District of Columbia Court of Appeals on January 26, 1977. (A copy of the Notice of Appeal is attached hereto as Appendix C.) The jurisdiction of the Supreme Court to review the decision of the District of Columbia Court of Appeals on direct appeal is conferred by 28 U.S.C. Section 1257(1) in that Section 18-302 of the District of Colubmia Code is a "statute of the United States" and the decision below is against its validity. Under 28 U.S.C. Section 1257 the District of Columbia Court of Appeals is expressly included as a "highest court of a State."

STATUTE INVOLVED

18 D.C. Code §302:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious

> sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. D.C.C.E. §18-302, vol. 10, page 51.

QUESTIONS PRESENTED

1. Does Section 18-302 of the District of Columbia Code violate the free exercise clause of the First Amendment?
2. Does Section 18-302 of the District of Columbia Code create a classification which bears a rational relationship to its purpose so as not to violate the equal protection-due process guarantee of the Fifth Amendment?

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Michael M. Doyle, executor of the estate of Sallye Lipscomb French, filed a Complaint for Instructions in the Superior Court of the District of Columbia (Probate Division). There was a stipulation as to the material facts of the case and cross motions for summary judgment were filed by all the parties to the action. Hearing on the motions for summary judgment was had before Judge Theodore R. Newman, Jr. on January 29, 1975. On February 13, 1975, Judge Newman issued an Opinion and Order which found that 18 D.C. Code §302 violated the First and Fifth

Amendments and which ordered that the estate of the decedent, Sallye Lipscomb French, be administered without regard to 18 D.C. Code §302. Appellants herein, the heirs-at-law of Sallye Lipscomb French, appealed from that Opinion and Order to the District of Columbia Court of Appeals which affirmed the decision of the Superior Court. The appellate court held that the statute is invalid under equal protection and due process principles of the Fifth Amendment and therefore did not consider the First Amendment issues.

The general question of the constitutionality of 18 D.C. Code §302 was first raised in the Complaint for Instructions, the initial pleading in this case. The specific federal questions in issue herein were raised in the "Memorandum of Points and Authorities in Support of Motion of Defendant John W. Key and the Heirs at Law of Sallye Lipscomb French for Summary Judgment," a pleading of the appellants herein filed in the Superior Court of the District of Columbia as well as in the memoranda of points and authorities filed by St. Matthew's Cathedral and Calvary Baptist Church, appellees herein, and that of the District of Columbia. In its Opinion and Order the Superior Court stated at page 6:

> For the reasons hereafter set forth, this Court hold (sic) that in addition to being an invalid infringement of the free exercise of religion provisions of the First Amendment, (citation omitted), 18 D.C. Code 302 is also unconstitutional and thus invalid as a denial of due process guaranteed by the Fifth Amendment. (Citation omitted.)

The federal questions were raised on appeal to the District of Columbia Court of Appeals by brief. That court in affirming the Superior Court clearly delineated the federal questions at page 2 of its opinion:

> This appeal involves a challenge to the constitutionality of D.C. Code 1973, §18-302, which provides that any devise or bequest to a clergyman or religious organization is invalid if made within 30 days of the testator's death. The trial court determined that the statute violated the First and Fifth Amendments of the United States Constitution. We affirm.

That the opinion rests on one of these federal questions is evident at page 5: "We agree that the statute is invalid under equal protection and due process principles and therefore find it unnecessary to consider the First Amendment issues."

THE QUESTIONS ARE SUBSTANTIAL

The two federal questions in issue are controlling of the judgment below and are substantial. Both the free exercise and due process concepts are basic to our lives and must be protected from improper application. The opinion of the District of Columbia Court of Appeals invalidates 18 D.C. Code §302, a law of the District of Columbia passed by Congress in 1866, on the basis that it violates the equal protection and due process principles of the Fifth Amendment. It further affirms the Superior Court's finding of a violation of the First Amendment. Appellants contend that these principles are misapplied in this case and that the Court of Appeals has refined the "rational basis" test beyond this Court's intention. The following argument exhibits the substantiality of both the questions presented herein.

ARGUMENT

I.

18 D.C. CODE §302 REGULATES A SECULAR ACTIVITY AND DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U.S. at 669.

> No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

Section 18-302 neither respects the establishment (or de-establishment) of religion nor interferes with its free exercise. Like the tax exemption granted religion, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Sunday Closing Law, *Braunfeld v. Brown*, 366 U.S. 599 (1961), it is legislation having a secular purpose and dealing with a secular activity. It does not deny support to religions. Indeed, only a very limited group of gifts, those made by will executed within thirty days of testator's death, are eliminated. Nor is there evidence that over 100 years of the statute have resulted in the establishment or de-establishment of church or religion.

While the Exercise Clause prohibits the placement of governmental restrictions on the freedom of belief, the freedom to act in accordance with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown, supra*, at 603. *Braunfeld* upheld the Sunday closing law despite the economic burden placed on Orthodox Jewish merchants whose religion prohibits them from working on Saturday.

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. 366 U.S. at 606.

Any disadvantage caused by Section 18-302 is far less direct and objectionable than that associated with the Sunday Closing Law, for Section 18-302 affects *all* religious sects equally.

The states have a legitimate interest in and possess extensive power to establish rules of inheritance. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed. 2d 288 (1971). The disposition of property by will is governed solely by state statute. As the Supreme Court noted in *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1949), a long line of cases has

> consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. 339 U.S. at 91-92, 70 S.Ct. at 506, 94 L.Ed. at 681.

Thus, testamentary disposition of property is a secular activity which Congress (with respect to the District of Columbia) has deemed to be within its proper legislature purview; it does not constitute the exercise of religion.

Whether the Exercise Clause gives any "rights" to religions is questionable. The Clause was framed with the individual in mind and had as its purpose the prevention of persecution on account of one's religious beliefs or activities. It is true that religions rely on donations. But it is difficult to see how the very limited restriction of §18-302 constitutes an interference with religion's exercise of religion if, indeed, the First Amendment embodies such a concept at all.

Section 18-302 is not unique in its effect of restricting gifts to religious organizations. A spouse's renunciation of a bequest or devise under D.C. Code §19-113, for example, could have a similar effect on bequests in the same will to religious organizations. The First Amendment cannot be read to invalidate any such statute which might have the indirect effect of restricting gifts to religious organizations.

II.

18 D.C. CODE §302 DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

18 D.C. Code 302 regulates a secular activity, the testamentary transfer of property. This is an activity in which the state has a legitimate interest. *Labine v. Vincent, supra.* The purpose of the statute as stated in the Encyclopedic Commentary of the D.C. Code Encyclopedia, is "to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants." D.C. Code Encyclopedia, §18-302, page 54. The statute has a very limited and indirect effect on religion. The statute does not regulate a fundamental interest protected by the First Amendment and therefore a showing of a compelling state interest is not requisite. There has been no violation of due process in this respect.

Nor does §18-302 create an irrebuttable presumption. Like the Pennsylvania statute in *In Re Estate of Cavill*, 329 A.2d 503 (1974), 18 D.C. Code 302 creates not a presumption but an express proscription against certain testamentary gifts. As J. Pomeroy (dissenting) in *Cavill* observed: "This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake." 329 A.2d at 510.

Since the statute expresses a proscription, there is no denial to the religious beneficiaries' right to be heard because they had no such right. Before the guarantees of procedural due process attach, a complaining party must demonstrate that he possesses some recognized

interest of life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-570, 92 S.Ct. 2740, 33 L.Ed. 2d 548, 556-557 (1972). Appellees have nothing more than an abstract need or desire or unilateral expectation of a benefit and consequently do not possess an interest sufficient to entitle them to be heard. *Board of Regents v. Roth, supra.*

Bolling v. Sharpe, 347 U.S. 497 (1954) reads the equal protection clause of the Fourteenth Amendment into the due process clause of the Fifth Amendment to apply it to the District of Columbia. Any unjustifiable discrimination is violative of due process under the test.

18 D.C. Code §302 does not discriminate among religions nor does it tend toward the establishment (or de-establishment) of religion. In fact it is questionable whether 18 D.C. Code §302 makes a classification at all and therefore whether the equal protection concept applies. It is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. *See* 18 D.C. Code 101 *et seq.* "Any of the preconditions of valid execution of a will . . . can be manipulated into 'classifications.'" *In Re Estate of Cavill, supra*, at 508 (J. Pomeroy, dissenting).

Assuming, however, that 18 D.C. Code §302 creates a classification, it does not violate the equal protection aspect of the Fifth Amendment. Because, as indicated above, the statute does not regulate a fundamental interest protected by the First Amendment, the appropriate test of its validity is the rational basis test.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on groups wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The Court of Appeals at page 6 of its opinion quotes from *Reed v. Reed*, 404 U.S. 71, 76 (1971). At pages 75-76 of *Reed v. Reed, supra*, the following language appears:

> In applying [the Equal Protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated* to the objective of that statute. (Emphasis supplied.)

Here, not only is the classification of the statute related to its objective but it bears a most rational relationship to the express legislative purpose (the "deathbed" theory, cited *supra*). Such concern for the public welfare is a proper governmental objective and in no way constitutes arbitrary action on the part of Congress.

The Court of Appeals notes at page 8 of its opinion that "Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, physicians, and charitable organizations, are not included in the statute. *See In re Small*, [100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972)]." Although the *position* may indeed be equal, the *influence* is far from

equal. Religious organizations, unlike other persons or organizations, appeal to a testator's interest in the salvation of his soul. They can exert a particularly strong and unique influence on one whose death is but thirty days away. It was to avoid such deathbed bequests that the statute was passed.

The "strict scrutiny" test is applied when discrimination is shown to infringe on fundamental constitutional rights. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As already indicated 18 D.C. Code 302 constitutes no direct or substantial infringement of a fundamental constitutional right. While it is clear that a statute placing a condition upon the exercise of the right to vote requires such strict review, *Dunn v. Blumstein*, 405 U.S. 330 (1972), not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review, *Bullock v. Carter*, 405 U.S. 134 (1972). Thus it appears that only in cases where the restriction imposed by law "has a real and appreciable impact on the exercise of the franchise," *Bullock, supra* at 144, will the Court invoke the strict scrutiny test. The right to vote is no less fundamental a right than that regarding the free exercise of religion.

The fact that the statute may sometimes cause harsh results does not render it unconstitutional. It is designed to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation.

> In those cases where the rational basis test is appropriate, the concepts of overbreadth and underbreadth are irrelevant and there exists no requirement that the state demonstrate a statute drawn with mathematical precision. *In Re Estate of Cavill, supra* at 509 (dissent), citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

Since the statute does not infringe on any First Amendment right, since there is a rational basis for the classification, and since the protection of the heirs and next of kin is a legitimate governmental objective, the statute must stand free from the interference of the judicial branch.

> In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom—whether that of this Court or the legislature—is not determinative of legislative power. *In Re Estate of Cavill, supra* at 509 (dissent).

CONCLUSION

Appellants maintain that the decision of the District of Columbia Court of Appeals was erroneous and urge this Court to take jurisdiction of the substantial questions presented in this case.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9490

ESTATE OF SALLYE LIPSCOMB FRENCH

JOHN W. KEY, ET AL., APPELLANTS,

v.

MICHAEL M. DOYLE, ET AL., APPELLEES.

Appeal from the Superior Court of the
District of Columbia
Probate Division

(Argued November 5, 1975 Decided November 1, 1976)

Floyd Willis III, with whom *Edith M. Gelfand* was on the brief, for appellants.

Michael M. Doyle entered an appearance as executor pro se.

Charles H. Burton, with whom *Robert J. Tyrrell* was on the brief, for appellee Calvary Baptist Church.

Nicholas D. Ward, with whom *William A. Glasgow* was on the brief, for appellee St. Matthew's Cathedral.

Before YEAGLEY and MACK, *Associate Judges*, and REILLY, *Chief Judge, Retired.*

Opinion for the Court by *Associate Judge* MACK.

Concurring opinion by *Retired Chief Judge* REILLY at p. 9.

MACK, *Associate Judge*: This appeal involves a challenge to the constitutionality of D.C. Code 1973, § 18-302, which provides that any devise or bequest to a clergyman or religious organization is invalid if made within 30 days of the testator's death. The trial court determined that the statute violated the First and Fifth Amendments of the United States Constitution. We affirm.

The facts of this case are not in dispute. Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Mrs. French had executed two previous wills in 1960 and 1963 in which she had made several religious bequests to both Baptist and Catholic organizations. There is no evidence that appellees had made any attempts to influence her choice of legatees.

The executor of Mrs. French's estate, Michael M. Doyle, instituted this action seeking instructions on the proper distribution of the estate in light of D.C. Code 1973, § 18-302. The decedent's heirs at law and next of kin (appellants)[1] and the legatee churches (appellees), all parties to the action, filed cross-motions for summary judgment contesting the constitutionality of § 18-302. The trial court granted summary judgment in favor of appellees, holding that the statute violated both the due process clause of the Fifth Amendment and the free exercise clause of the First Amendment. Accordingly, the court ordered that Mrs. French's estate and all future probate cases in the District of Columbia be administered without regard to § 18-302.

[1] Appellants are the decedent's brother and several of her nieces and nephews.

Section 18-302, so-called "Mortmain statute," was enacted in 1866 and has remained substantially unchanged to the present time.[2] Specifically, it states that:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. [D.C. Code 1973, § 18-302.]

The purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3970-71 (1866). Mortmain statutes in general are intended to protect a donor's family from disinheritance due to charitable gifts made either without proper deliberation or as a result of undue influence on the part of the bene-

[2] The statute had its genesis in the 34th Section of the Maryland Declaration of Rights which invalidated, among other things, substantially all devises and bequests to religious persons or organizations. *See Speer v. Colbert*, 200 U.S. 130, 141 (1906). This provision resembled the English Mortmain statutes which prohibited devises of land for religious or charitable uses. *See* 4 A. SCOTT, THE LAW OF TRUSTS § 362.2 (2d ed. 1956). Section 34 was made applicable to the District of Columbia by the Organic Act of 1801, ch. 15, § 1, 2 Stat. 103. In 1866 it was amended to invalidate only devises and bequests to religious entities made within one month of death. Act of July 25, 1866, ch. 237, 14 Stat. 232.

ficiaries. *See* G. G. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326 (2d ed. 1964); 4 A. SCOTT, THE LAW OF TRUSTS § 362.4 (2d ed. 1956).

Section 18-302, by its terms, declares void only bequests and devises for the benefit of religious institutions or the clergy. Testamentary gifts to non-religious charitable or educational organizations are not included.[3] Moreover, by judicial decision gifts to charitable, educational and artistic organizations, even though operated by religious institutions, have been held to be beyond the aegis of the statute. *See, e.g., Colbert v. Speer*, 24 App. D.C. 187 (1904), *aff'd*, 200 U.S. 130 (1906); *In re Estate of Susan Evelyn Murray*, Admin. No. 29831 (D.C. Supreme Ct. Dec. 26, 1924). For example, our courts have upheld gifts to such organizations as sectarian universities, *Colbert v. Speer*, *supra* (Georgetown University); orphanages run by religious orders, *Id.* (St. Vincent's Orphan Asylum, St. Joseph's Orphan Asylum); and religious groups or committees formed for charitable purposes, *In re Estate of Henry Kroger*, Admin. No. 1901-67 (D.D.C. May 6, 1968) (Salvation Army); *In re Estate of Mariette Little*, Admin. No. 34929 (D.C. Supreme Ct. Nov. 13, 1928) (Board of Relief of the Presbyterian Church); *In re Estate of Murray, supra* (Little Sisters of the Poor).[4]

[3] Seven other jurisdictions have Mortmain statutes similar to § 18-302; however, only the District of Columbia statute restricts testamentary gifts solely to religious entities. The other state statutes restrict substantially all charitable gifts made within a certain period before death. *See* G. G. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326 (2d ed. 1964, Supp. 1975).

[4] *But see McInerney v. District of Columbia*, 122 U.S.App. D.C. 413, 355 F.2d 838 (1965) (gift to the Society of Perpetual Adoration, a semi-cloistered order of nuns, held invalid). In the instant case, a legacy to the Little Sisters of

Thus, in a series of cases involving § 18-302 and its predecessor sections, legacies allegedly barred by the statute were held to be valid either because the legatee was characterized as a charitable rather than a religious organization or by invoking the doctrine of dependent relative revocation.[5] These cases demonstrate that the courts in this jurisdiction sought to avoid the impact of the statute whenever possible in an effort to effectuate the intent of the testator. Finally in 1972, the United States District Court for the District of Columbia, rather than engaging in "leger-de-main . . . to avoid the operation of the statute," held it to be unconstitutional on First Amendment grounds. *See In re Small*, 100 WASH. L. RPTR. 453 (D.D.C. Feb. 7, 1972).[6]

Because that decision is not binding in the instant case, the trial court re-examined § 18-302 and determined that it not only infringed on First Amendment rights, but it also established an arbitrary classification in violation of the due process clause of the Fifth Amendment. We agree that the statute is invalid under equal protection and due process principles and therefore find it unnecessary to consider the First Amendment issues.

Equal protection of the law is guaranteed in the District of Columbia by the due process provisions of the

the Poor was found to be valid because the organization is not a religious institution within the meaning of § 18-302.

[5] *See Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S.App.D.C. 351, 187 F.2d 357 (1950). The doctrine of dependent relative revocation may be applicable only if the challenged bequest is set forth in an earlier will executed more than 30 days prior to the testator's death.

[6] Probate jurisdiction was transferred from the United States District Court to the Superior Court of the District of Columbia on August 1, 1973. D.C. Code 1973, § 11-501.

Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *See also Jiménez v. Weinberger*, 417 U.S. 628, 637 (1974).[7] The equal protection guarantee "requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). *See also Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'." *Reed v. Reed*, 404 U.S. 71, 76 (1971), *quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *See also Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). The statute in question creates two classes of beneficiaries: one class composed of clergymen and religious institutions and a second class encompassing all other beneficiaries. The issue, therefore, is whether this classification bears any rational relationship to the purpose of the statute.

The Supreme Court of Pennsylvania confronted the same issue with respect to the Pennsylvania Mortmain statute in *In re Estate of Cavill*, —— Pa. ——, 329 A.2d 503 (1974). *See also Riley v. Riley*, —— Pa. ——, 329 A.2d 511 (1974), *cert. denied*, 421 U.S. 971 (1975). That statute invalidated all charitable gifts made within 30 days of the testator's death, unless those who would benefit by the invalidity agreed to the gift. The

[7] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, —— U.S. ——, 96 S.Ct. 612, 670 (1976), *citing Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

court held that the statute denied the charitable beneficiaries equal protection of the laws, stating:

> Clearly, the statutory classification bears only the most tenuous relation to the legislative purpose. The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary.
>
> Furthermore, while the legislative purpose is to protect the decedent's family, the statute nevertheless seeks to nullify bequests to charity even where, as here, the testator leaves no immediate family. . . . This protection of a nonexistent "family" defeats the testator's expressed intent without any relation to the purpose which is sought to be promoted, further demonstrating the irrationality of the statutory classification. [Footnote omitted.] [—— Pa. at ——, 329 A.2d at 505-06.]

We agree with the reasoning of the Pennsylvania court and find the District of Columbia Mortmain statute to be perhaps even more arbitrary than the Pennsylviana statute. The purpose of both statutes is to protect the family of a testator who was unduly influenced by religious considerations. Consequently, the Pennsylvania statute invalidated all charitable gifts made within 30 days of death. However, the District of Columbia statute, as interpreted by the courts, voids only religious

devises or bequests and distinguishes further between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions, making only the latter valid. There is no rational basis for presuming that a testator troubled by religious considerations is likely to make a bequest directly to a church, rather than to a charity run by the church. Thus, the statute arbitrarily provides different treatment for similarly situated legatees.[8] *Cf. Reed v. Reed*, *supra* at 77.

In addition, § 18-302 establishes an irrebuttable presumption that certain bequests to clergymen or religious organizations are the result of undue influence. Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, and charitable organizations, are not included in the statute. *See In re Small*, *supra*. A gift to any of these persons is valid unless undue influence or lack of testamentary capacity is proved. There is no ground of difference that rationally explains the different treatment accorded religious entities. *Cf. Eisenstadt v. Baird*, *supra* at 447.

The statute is substantially over-inclusive in that it voids many intentional bequests by testators who were not impermissibly influenced or who do not have immediate family members in need of protection. It is also substantially under-inclusive in that it does not affect many charitable gifts made without proper deliberation, nor does it void legacies to persons who are in an equal position with religious persons to influence

[8] We also note that although § 18-302 is intended to protect the testator's family, its provisions operate regardless of whether the testator has any family at all. In the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia.

a testator. Consequently, we conclude that the classification established by § 18-302 has no rational relationship to the purpose of the legislation and hence denies religious legatees equal protection of the law.[9] *See In re Estate of Cavill*, *supra* at 506. *Cf. Jiménez v. Weinberger*, *supra* at 637; *Eisenstadt v. Baird*, *supra* at 454.

Accordingly, the due process clause of the Fifth Amendment requires that the statute not be given effect in the administration of estates in the District of Columbia.

Affirmed.

REILLY, *Chief Judge, Retired*, concurring: In joining in the holding that the challenged statute[1] denying validity to bequests for religious uses unless made at least 30 days before the death of the testator cannot be upheld under the Constitution, I agree with many of the observations made in the majority opinion. Nevertheless, I think that the decision should be rested on the ground that in enacting this particular statute, Congress did what it was forbidden to do by the text of the First Amendment providing that "Congress shall make no law

[9] The trial court determined that there is neither a compelling state interest nor rational grounds justifying the statutory classification. Since we conclude that the discriminatory treatment cannot stand even under the "rational basis test," it is unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest. *See Labine v. Vincent*, 401 U.S. 532, 551 n.19 (1971) (dissenting opinion). *See also Jiménez v. Weinberger*, *supra* at 631-32; *Eisenstadt v. Baird*, *supra* at 447 n.7.

[1] D.C. Code 1973, § 18-302.

respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

This court, in contradistinction to some appellate tribunals, has been most reluctant to declare Acts of Congress unconstitutional in the absence of any controlling decision by the United States Supreme Court. Where we find it necessary to do so, it seems to me that whenever possible we should rely upon specific constitutional language more precise than the "due process" and "equal protection" clauses which lead inevitably to judicial consideration of such elusive concepts as rational legislative purpose, unreasonable classifications, and compelling state interests.[2]

The making of a will, of course, is not a constitutional right, *Irving Trust Co. v. Day*, 314 U.S. 556 (1942), but one granted by legislative bodies. Accordingly, it has been widely recognized that states have the power to limit the rights of testators to make testamentary gifts which disinherit in whole or in part their next-of-kin—popularly referred to by probate courts as the natural objects of their bounty. Thus, statutes which insure spouses and dependent children a certain proportion of a testator's property are not unusual. Statutes designed to protect against undue influence, *e.g.*, the voiding of gifts to attesting witnesses, legal counsellors, etc., are also common even though they create an irrebuttable presumption of undue influence where, in fact, none may exist.

As Judge Mack has pointed out, the purpose of the statute here is not solely to protect the natural expec-

[2] The Supreme Court of Pennsylvania fell into this morass in an opinion on a somewhat different mortmain statute, *In re Estate of Cavill*, 329 A.2d 503 (1974). *See* dissenting opinion of Pomeroy, J.

tancies of the testator's family from being defeated by substantial testamentary dispositions in favor of strangers or institutions. Its real vulnerability is that it singles out bequests for religious uses in contrast to bequests for charitable, educational, artistic, or humane institutions. According to appellees, the statute's main purpose is to prevent advocates of traditional religions, particularly the clergy, from influencing the dying by holding out hopes of salvation or avoidance of damnation in return for generous gifts to further the practice of religion. But such an objective is precisely what the "free exercise" of religion clause of the First Amendment forbids, for it is premised upon the assumption that such representations are false and hence Congress can enact safeguards against their effect.

Thus, even though it could be proved (much less presumed) that agents of the two churches, whose legacies would be voided under the statute, secured these benefits by representations made to the testatrix as death was imminent, the text of the First Amendment and judicial decisions construing it show that they had a constitutional right to make them. *See, e.g., Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating license fee statutes as applied to vendors of religious books and tracts); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down prohibition against unlicensed door-to-door solicitation of religious contributions); and *Sherbert v. Verner*, 374 U.S. 398 (1963) (general economic regulation not enforceable if it imposes even an indirect burden on certain religious practices). Accordingly, the statute infringes on rights which the legatees had standing to assert and therefore cannot stand under the First Amendment.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PROBATE DIVISION

Administration No. 2188-72

In Re: Estate of Sallye Lipscomb French, Deceased

Michael M. Doyle,

Plaintiff

v.

John W. Key, *et al.*,

Defendants

OPINION AND ORDER

This is an action by Judge Michael M. Doyle, Executor of the decedent's estate, seeking instructions on the proper disposition of said estate. The issue presented for decision is the proper distribution of the residue of the estate given the existence of the following statutory provision:

> "A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefore, is not valid unless it is made at least 30 days before the death of the testator." 18 D.C. Code 302 (1973 ed.)

The matter is before the Court on cross motions of all present defendants[1] for summary judgment, the material facts having been stipulated.

In so far as is relevant to decision, the facts are as follows:

The testatrix Sallye Lipscomb French, executed the subject Last Will and Testament on October 13, 1972. She died on November 2, 1972. By the terms of her Last Will and Testament one-third of her residue is left to the Calvary Baptist Church, Washington, D.C. and one-third to St. Matthew's Cathedral, Washington, D.C. None of the parties to this litigation know of any attempts by any members or representatives of either the Baptist Church or the Catholic Church to influence, cajole or otherwise persuade the Testatrix to make any bequests to them or their organizations.

It is the position of the residuary legatees, defendants Calvary Baptist Church and St. Matthew's Cathedral, that 18 D.C. 302, which would void their legacies under the facts of this case, is unconstitutional on the grounds, *inter alia*, that it interferes with First Amendment rights and that it creates a discriminatory classification that amounts to a denial of due process under the Fifth Amendment. The District of Columbia and the heirs at law, on the other hand, assert the Constitutional validity of the statute and maintain that the residual estate should be distributed intestate

[1] The motion for summary judgment of defendant Little Sisters of the Poor was granted by this Court on December 19, 1974, after opposition to said motion was withdrawn and it appearing to the Court that Little Sisters of the Poor is not a sectarian institution within the meaning of 18 D.C. Code 302, *supra*. Accordingly, the bequest to Little Sisters of the Poor was valid without regard to 18 D.C. Code 302, *supra*, and the executor was ordered to distribute the property described in said bequest.

without regard to the residuary legacies here in question.[2]

18 D.C. Code 302 is derived from the 34th Section of the Maryland Declaration of Rights, adopted in 1776, which was itself patterned after the British Statutes of Mortmain. Ch. 36, Magna Carta (1215). Said Maryland provision was made applicable to the District of Columbia by the Organic Act of 1801, 2 Stat. 103, Ch. 15, Sec. 2. In its present form, 18 D.C. Code 302, was enacted by the 39th Congress in 1866, and remains substantially unchanged to date.

There has been frequent litigation concerning what legacies are barred by this statute. This litigation has generally centered around two issues: (1) is the legatee a charitable as distinguished from a religious organization; and, (2) if the legatee is a religious organization, is the legacy valid under the doctrine of dependent relative revocation. The first case of which this Court is aware construing the D.C. Code provision is *Speer v. Colbert*, 200 U.S. 130 (1906). In that case, the Supreme Court held that Georgetown University, St. Vincent's Orphan Asylum, and St. Joseph's Orphan Asylum were not legatees within the interdiction of the statute although all three of them were owned and run by various Orders of the Roman Catholic Church.

In 1924, in the case of *In re: Estate of Susan Evelyn Murray*, Admn. No. 29831, the District of Columbia Supreme Court held that a legacy to the Little Sisters of the Poor was not interdicted by the statute although said organization is operated by the Congregation of the Little Sisters of the Poor, a Roman Catholic order. Likewise, the Salvation Army (Estate of Henry Kroger, Admn. No. 1901-67); the Society for the Propagation of the Faith, Shrine of the Immaculate

[2] The one-third portion of the residual estate bequeathed to Johns-Hopkins University is not controverted.

Conception (Estate of Louise B. Hoffman, Admn. No. 40,475–dependent relative revocation doctrine may have also played some role); and the Board of Relief of the Presbyterian Church (Estate of Mariette Little, Admn. No. 34,929) have all been held to be legatees not falling within the purview of the statute. The above listing is not exhaustive but rather is representative. It is fair to say that the Courts of this jurisdiction have assiduously construed this statute strictly so as to avoid its impact. The doctrine of dependent relative revocation and variation thereupon have been the frequent handmaidens of the Courts in this task. *cf. Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 187 F.2d 357 (1950).

The first frontal attack on the constitutionality of 18 D.C. Code 302, or its predecessor statutes, of which this Court has been made aware was launched by certain Roman Catholic religious orders which were legatees under the last will and testament of Madeleine B. Small, Admn. No. 2507-70. In the *Small* estate, the executor contended that the legacies to the Commissariat of the Holy Land for the United States of America, otherwise known as the Franciscan Monastery, and to the Franciscan Nuns of the Most Blessed Sacrament, otherwise known as Poor Clares of Perpetual Adoration, as well as certain other legacies were invalid under the statute. After full briefing and argument, the United States District Court for the District of Columbia (Gesell, J.) held on February 28, 1972, that 18 D.C. Code 302, was unconstitutional as being an invalid infringment of the First Amendment to the Constitution of the United States. 100 Wash. L. Rptr. 453; Admn. No. 2507-70. No appeal was taken from that ruling.[3]

[3] The District of Columbia was not a party to those proceedings.

Subsequent thereto, and so long as jurisdiction over probate matters remained vested in the United States District Court, all estates presenting issues under 18 D.C. Code 302 were administered without reference to that statute. No challenge was raised by the District of Columbia Government to the application of the *Small* ruling thereafter, so long as probate jurisdiction remained in the District Court. However, upon the transfer of probate jurisdiction to this Court, the District of Columbia seeks a redetermination of said issue by refusing to issue an Inheritance Tax Certificate required by Rule 14(c) of the Probate Rules of this Court unless the Executor amends his final account to delete the payment of legacies to the Little Sisters of the Poor,[4] Calvary Baptist Church, and St. Matthews Cathedral. Whereupon, the Executor filed this complaint for instructions.

In considering the issues here presented the Court has had the advantage of an extensive review by counsel of the legislative history of the statutory provision here at issue going back to the Magna Carta. In a nutshell, this history reflects that although the original English statutes were motivated by incidents of feudal land ownership and an antipathy to land being owned by the Church, the purpose of the D.C. enactments (in so far as purpose can be derived from brief discussion on the floor of the Senate), was to prevent undue influence being worked upon testators by religious bodies and entities by promises of eternal salvation of the soul or the like.

That a will procured by undue influence is invalid, whether exercised by a religious or non-religious entity or being, requires no citation of authority. That the statute in question creates an irrebuttable presumption of undue influence is also clear. *McInerney v. D.C.*, 122

[4] See n. 1, *supra*.

U.S. App. D.C. 413, 355 F.2d 838 (1965). Thus, if 18 D.C. Code 302 is valid, the legacies here involved are void without regard to the factual absence of any kind of undue influence.

Counsel for all the parties here focus on the free exercise of religion provisions of the First Amendment as did Judge Gesell in the *Small* case, *supra*. While the arguments that 18 D.C. Code 302 is invalid on First Amendment grounds are persuasive and indeed perhaps compelling, this Court relies on other grounds as well. For the reasons hereafter set forth, this Court hold that in addition to being an invalid infringement of the free exercise of religion provisions of the First Amendment, *cf. In Re Small estate, supra*, 18 D.C. Code 302 is also unconstitutional and thus invalid as a denial of due process guaranteed by the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693.

Title 18 D.C. Code 302, as set forth above, is directed only to religious groups and practitioners. It is clear from the statute that a distinction is created between religious bequests and all others. The impact of this distinction operates to the detriment of only those enumerated in the statute. It is evident, therefore, that this classification affects interests which have traditionally been regarded as in a preferred position under our Constitution. The Supreme Court has often considered the need to strike the proper balance between the Freedom of Religion on the one hand and society's need for regulating in this area on the other hand. It has been established that the proper state role must be that of neutrality, *see generally, Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409 (1970); *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (1963).

The freedom to act in accordance with one's religious beliefs is not absolute. *Cantwell v. State of Connecticut*,

310 U.S. 296, 60 S.Ct. 900 (1940). The regulation of such conduct or actions, however, can only be justified by a showing of a compelling state interest. *Sherbert v. Verner et al.*, 374 U.S. 398, 83 S.Ct. 1790 (1963). *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624, 63 S.Ct. 1178 (1943); *Barnett v. Rodgers*, 133 U.S. App. D.C. 296, 410 F.2d 995 (1969); *Busey et al. v. District of Columbia*, 78 U.S. App. D.C. 189, 138 F.2d 592 (1943).

It has been argued to this Court that the distinctive treatment given to religious bequests under 18 D.C. Code 302 can be justified by the state's interest in preventing those covered by the statute from using their religious status to influence a testator who is close to death. If this be the purpose of the statute, and it is the only one urged upon the court, it cannot satisfy the requirement of a showing of a compelling state interest since alternative, less restrictive methods of preventing abuse are available.

Even assuming, arguendo, that one's religious occupation gives one greater impact and influence on a testator than one who is in a non-religious occupation (an assumption that the common experience of lawyers experienced in handling probate matters would doubtlessly controvert based on their experience in litigating undue influence complaints), there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period. *cf. Sherbert v. Verner, supra; Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146 (1939). Likewise, no compelling state interest grounds are apparent to distinguish between the effect of the clergy prevailing upon a testator to leave a legacy to a "religious" entity and the same conduct in prevailing upon a testator to leave such legacy to a "charity" owned and operated by the clergy. Indeed, even if the

constitutional test to be applied is the "rational grounds" test, this Court is of the view that no rational grounds exist for the classification set forth in the statute. Where there is no rational grounds for the statutory classification, the D.C. statute must fall as a violation of Fifth Amendment due process. *See generally, Bolling v. Sharpe, supra; Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187 (1964).

This Court expresses no view of what appropriate legislative action may be taken to regulate the activities attempted to be covered by the existing 18 D.C. Code 302. Nor does this opinion reach the question of whether or not the State can regulate religious bequests at all, consonant with First Amendment rights. Suffice it to say that once the state has permitted legacies or devises generally, it can not thereafter limit same in an unconstitutional manner. *cf. Goss v. Lopez*, 43 U.S.L.W. 4181 (Supreme Court, January 21, 1975).

For the reasons stated above, the Court makes the following:

CONCLUSIONS OF LAW

1. The provisions of 18 D.C. Code 302 are invalid as constituting an unconstitutional infringement of the free exercise of religion provisions of the First Amendment.

2. Said statute affects a fundamental interest protected by the First Amendment, regulation of which can be sustained only upon showing of a compelling state interest.

3. No compelling state interest has been shown to justify the classification made by the statute, particularly in light of less restrictive alternatives.

4. No rational basis has been shown for the distinctive treatment of religious bequeaths versus non-religious bequeaths.

5. In light of Conclusions of Law 2 thru 4, above, the provision of 18 D.C. Code 302 are invalid as constituting a deprivation of due process of law guaranteed by the Fifth Amendment.

Accordingly, it is by the Court this 13th day of February, 1975,

ORDERED:

1. That the Estate of the decedent, Saliye Lipscomb French, be administered without regard to 18 D.C. Code 302.

2. That the District of Columbia be and it hereby is order to issue the tax certificate required by Rule 14(c) of the Probate Rules of this Court upon payment of inheritance taxes due to the District of Columbia in this estate, treating the legacies to St. Matthew's Cathedral, Calvary Baptist Church and the Little Sisters of the Poor as valid legacies.

3. This ruling shall apply to all probate cases administered in the Superior Court of the District of Columbia from August 1, 1973, forward, said date being the effective date of the transfer of probate jurisdiction from the United States District Court for the District of Columbia to this Court.

/s/Theodore R. Newman, Jr.
THEODORE R. NEWMAN, JR.
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opinion and Order was mailed this 13th day of February, 1975, after said Opinion and Order had been docketed, to the following: Michael M. Doyle, Attorney for Plaintiff, 1010 Vermont Avenue, N.W., Room 606, Washington, 20005; William A. Glasgow, Esquire, and Nicholas D. Ward, Esquire, Attorneys for defendant, Hamilton and Hamilton, 600 Union Trust Building, Washington, D.C.; David J. Hensler, Esquire, Attorney for Defendant Little Sisters of the Poor, 815 Connecticut Avenue, N.W., Washington, D.C. 20006; Charles H. Burton, Esquire, Attorney for defendant Calvary Baptist Church, 3900 Wisconsin Avenue, N.W., Washington, D.C.; Floyd Willis, IV, Esquire, Attorney for defendants heirs at law, 416 Hungerford Drive, Rockville, Md., 20850, and Edmund Browning, Esquire, Assistant Corporation Counsel, District Government, 601 Indiana Avenue, N.W., Room 301, Washington, D.C. 20004.

/s/Theodore R. Newman, Jr.
THEODORE R. NEWMAN, JR.
JUDGE

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9490

ESTATE OF SALLYE LIPSCOMB FRENCH

JOHN W. KEY, ET AL., APPELLANTS,

v.

MICHAEL M. DOYLE, ET AL., APPELLEES.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John W. Key, et al., the appellants above named, hereby appeal to the Supreme Court of the United States from the judgment of the District of Columbia Court of Appeals of November 1, 1976. This appeal is taken pursuant to 28 U.S.C. Section 1257(1).

By their attorney,

/s/Floyd Willis III
FLOYD WILLIS III
416 Hungerford Drive, Suite 220
Rockville, Maryland 20850
301-424-7444

(Filed January 26, 1977)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Notice of Appeal was served by first-class mail, postage prepaid, this 25th day of January, 1977, on the following persons:

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St. Matthew's Cathedral
600 Union Trust Building
Washington, D.C. 20005

/s/Floyd Willis III
FLOYD WILLIS III
Attorney for Appellants

Supreme Court, U. S.
FILED
MAY 5 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

APPEAL DOCKETED JANUARY 31, 1977
JURISDICTION POSTPONED MARCH 21, 1977

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9490

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

LIST OF DOCKET ENTRIES
(The docket entires are not part of the record.)

Apr. 28, 1975 Transcript of record (n)
June 9, 1975 Appellants' brief (m-6 & 9)
June 23, 1975 Motion of appellee, St. Matthews Cathedral, to extend time to file brief to July 25th (m-23)
June 25, 1975 Clerk's order granting appellee, St. Matthews Cathedral, ext. to file brief to July 25.
July 7, 1975 Motion of appellee, Calvary Baptist Church, for leave to file brief to July 25. (m-3)
July 8, 1975 Clerk's order granting Calvary Baptist Church for leave to file brief to July 25.
July 23, 1975 Notice of Appellee, St. Matthew's Cathedral, under Rule 47 (m-23)

July 25, 1975 Notice of appellee, Calvary Baptist Church, under Rule 47 (m-24)

July 25, 1975 Appellee's (St. Matthew's Cathedral) brief (m-24)

July 25, 1975 Appellee's (Calvary Baptist Church) brief (m-25)

Nov. 5, 1975 ARGUED before Judges Reilly, Yeagley and Mack.

Nov. 1, 1976 Opinion per Associate Judge Julia Cooper Mack. (Judges Yeagley, Mack and Reilly)

Nov. 1, 1976 Judgment affirming judgment of trial court.

Nov. 23, 1976 MANDATE ISSUE

Jan. 26, 1977 Appellants' notice of appeal to the Supreme Court (m-25)

Jan. 31, 1977 Letter from Clerk to Clerk, Supreme Court.

Mar. 30, 1977 Certified copy of order from Supreme Court dated March 21, 1977 postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. (Supreme Court No. 76-1057).

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(Probate Division)

Estate of Sallye Lipscomb French,
Deceased
Administration No. 2188-72

Relevant docket entries:

June 27, 1974 Complaint of Michael M. Doyle for instructions.

Sept. 26, 1974 Motion of the District of Columbia for leave to intervene as a defendant and for other relief, filed with points and authorities in support of motion and certificate of service.

Sept. 27, 1974 Order granting Motion, and that the answer with amended caption be hereby accepted.

Dec. 6, 1974 Stipulation regarding statement of material facts as to which there is no genuine issue.

Dec. 6, 1974 Motion of defendant #15 for Summary Judgment, filed with memorandum of points and authorities, exhibit and certificate of mailing.

Dec. 11, 1974 Motion of the District of Columbia by its attorneys for Summary Judgment, filed with points and authorities in support of Motion and certificate of mailing.

Dec. 12, 1974 Motion of Defendant #14, Calvary Baptist Church, for Summary Judgment, filed with memorandum of points and authorities in

support of defendant's motion and certificate of mailing.

Dec. 12, 1974 Motion of defendant John W. Key and the heirs at law of Sallye Lipscomb French for Summary Judgment, filed with statement of material facts as to which there is no genuine issue, request for hearing; memorandum of points and authorities in support of Motion of John W. Key; exhibit and certificate of mailing.

Feb. 13, 1975 Opinion and Order, filed with certificate of mailing.

March 4, 1975 Notice of appeal of John W. Key, et al. the defendants heirs by their attorney from Court Order of February 13, 1975, filed with certificate of mailing.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

COMPLAINT FOR INSTRUCTIONS.

The Complaint of Michael M. Doyle respectfully represents to the Court:

1. Your Complainant is the duly appointed and qualified Executor of the above captioned estate and is now desirous of filing his Final Account herein.

2. The Last Will and Testament of Sallye Lipscomb French, deceased, provided certain legacies and bequests to specified individuals, bequeathed all furniture and furnishings to the Little Sisters of the Poor (St. Joseph's Home), and disposed of the residue of said estate as follows:

> "11. All the rest, residue and remainder of my property, real, personal and mixed, I desire divided into three (3) equal portions, and I give, devise and bequeath, absolutely and forever, and in fee simple, one (1) portion to Calvary Baptist Church, Washington, D.C., and one (1) portion to St. Matthews Cathedral, Washington, D.C., and one (1) portion to the Johns-Hopkins University, Baltimore, Maryland. Said bequest to Johns-Hopkins University is to be used as a scholarship fund at the School of Medicine. This fund is to be known as Bernard S. French Scholarship Fund and to be administered by the Dean of the School."

3. Said Will was executed on October 13, 1972, and Codicil thereto (which Codicil is not germane to the question now presented) was executed on October 26, 1972. The Testatrix died on November 2, 1972, within thirty (30) days of the execution of said Will and Codicil.

4. Title 18, Section 302 of the District of Columbia Code provides that "a . . . bequest . . . to a religious sect, order of denomination . . . is not valid unless it is made at least thirty days before the death of the testator."

5. On February 7, 1972, Judge Gesell of the United States District Court for the District of Columbia, which Court then exercised exclusive jurisdiction over District of Columbia probate proceedings, held the above statute unconstitutional, void and of no effect, stating:

> "The Court is unable to find in the statute any justification which can withstand examination of the statute in the light of the First Amendment.
>
> * * *
>
> The First Amendment is now clearly defined in many cases, including cases brought to the Court's attention in the papers. The question of determining what acts of Government tend to interfere with religion falls well within what the courts have long been called on to do in this sensitive area and I think it is time this statute be identified for what it is and stricken."

No appeal was taken from said District Court decision, a copy of which is attached hereto and made a part hereof.

6. Believing that said decision of the District Court now represents and states accepted law of the District of Columbia, your Complainant proposed to state a Final Account as Executor herein, showing distribution of furniture and furnishings to the Little Sisters of the Poor and distribution of one third of the residue of said estate to Calvary Baptist Church and one third of said residue to St. Matthews Cathedral, all three proposed

distributees being non-taxable. However, a representative of the District of Columbia Department of Finance and Revenue has questioned the legality of such distribution in view of Section 18-302 of the District of Columbia Code, and has indicated the intention of that Department to refrain from issuing the Tax Certificate required by Rule 14(c) of this Court, in the event that the proposed distribution is shown in the Final Account of Complainant.

7. The furniture and furnishings bequeathed to the Little Sisters of the Poor have been appraised herein at a value of $3,347.00. The residuary estate is presently valued at approximately $328,000.00, subject to payment of administration expenses, including the Executor's commission. The bequest of one-third of the residuary estate to Johns-Hopkins University has not been questioned by the Department of Finance and Revenue.

8. In the event that this Honorable Court should determine that the bequests to the Little Sisters of the Poor, to the Calvary Baptist Church and to St. Matthew's Cathedral are void by reason of the provisions of 18-302 of the District of Columbia Code, then the respective amounts of said bequests will be intestate property passing to the following heirs at law and next of kin of the Testatrix, all of whom are adults under no legal disability:

John W. Key – brother
Route 2
Hereford, Texas 79045

Children of Brother – Ira T. Key, deceased

Aubrey T. Key – nephew
4100 Jackson Street, #238
Austin, Texas 78731

Florence Key Mayes – niece
1438 Edwin
Beaumont, Texas 77705

Children of sister – Eugenia Key Cagle, deceased

Myna Cagle Milner – niece
1812 South Tyler Street
Little Rock, Arkansas 72204

Sadah Cagle Quesenberry – niece
2006 Fair Park Boulevard
Little Rock, Arkansas 72204

Katherine J. Cagle – niece
1220 South Taylor Street
Little Rock, Arkansas 72204

Children of brother – Wilette Key, deceased

Dorothy Katherine Key – niece
4115 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Ruth May Key Garrett – niece
1320 Stever Avenue
Peoria, Illinois 61604

Shelton Thomas Key – nephew
708 Maryland Avenue
Amarillo, Texas 79106

Martha Louise Key Norris – niece
8 West Rosemont Avenue
Alexandria, Virginia 22301

Anna Pearl Key Keene – niece
Route 3, Box 2
Walnut Grove, Missouri 65770

Son of deceased sister – Evelyn Key Anderson

Frank O. Anderson – nephew
4105 Byrd Court
Kensington, Maryland 20795

9. Your Complainant desires the instructions of this Honorable Court as to whether effect should be given to the intent of the Testatrix with respect to distribution of the bequests provided for the Little Sisters of the Poor, St. Matthew's Cathedral and Calvary Baptist Church.

WHEREFORE, the premises considered, Complainant prays:

1. That the above named heirs at law and next of kin of the Testatrix, together with Little Sisters of the Poor, St. Matthew's Cathedral, Calvary Baptist Church and the proper officials of the government of the District of Columbia, be made parties respondent to this Complaint; and that summons and process issue to them pursuant to Title 13, Chapter 3, of the District of Columbia Code, requiring them to appear herein by a day certain and answer this Complaint unless they voluntarily appear and answer.

2. That this Honorable Court will instruct Complainant as to the proper distribution of the property comprising the bequests to the Little Sisters of the Poor, to St. Matthew's Cathedral, and to the Calvary Baptist Church.

3. For such other and further relief as to the Court may seem proper.

/s/ Michael M. Dyle
MICHAEL M. DOYLE
Executor

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing Complaint, subscribed by me as Executor of the Estate of Sallye Lipscomb French, Deceased, and know the contents thereof; that the facts stated therein on personal knowledge are true and those stated on information and belief I believe to be true.

/s/ Michael M. Doyle
MICHAEL M. DOYLE

Subscribed and sworn to before me this 26th day of June, 1974.

/s/
Notary Public, D.C.

/s/ Michael H. Doyle
Michael M. Doyle, Executor
Estate of Sallye Lipscomb French, deceased
1010 Vermont Avenue, N.W.
Washington, D.C. 20005
NA 8-1930

SUPERIOR COURT
OF
THE DISTRICT OF COLUMBIA
Probate Division
[Title omitted in printing.]

STIPULATION REGARDING STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

It is hereby agreed and stipulated by and between counsel for the respective parties hereto that there is no genuine issue as to any of the following material facts.

1. The testatrix Sallye Lipscomb French executed the subject Last Will and Testament on October 13, 1972, and a Codicil, which is not involved in this litigation, on October 26, 1972. She died on November 2, 1972.

2. By the terms of her Last Will and Testament one-third of her residue is left to the Calvary Baptist Church, Washington, D.C., and one-third to St. Matthew's Cathedral, Washington, D.C.

3. The Calvary Baptist Church is a District of Columbia religious corporation which has legal capacity to accept bequests.

4. St. Matthew's Cathedral, Washington, D.C., is owned by William W. Baum, Roman Catholic Archbishop of Washington, a corporation sole, by special act of Congress approved May 29, 1948, as Private Law 319 – 80th Congress. Title to property bequeathed to St. Matthew's Cathedral under canon law belongs to the corporation sole which has legal capacity to accept bequests.

5. By the terms of her Last Will and Testament, testatrix devised and bequeathed all of her furniture and furnishings to the Little Sisters of the Poor (St. Joseph's Home) Washington, D.C.

6. The Little Sisters of the Poor is a non-profit charitable corporation which was organized under the laws of the District of Columbia and which operates a home for the aged located at 220 H Street, N.W., Washington, D.C. As specified in the articles of incorporation, the Little Sisters of the Poor was incorporated "for benevolent and charitable purposes" and its particular business and object is "to take care of, support and maintain aged men and women."

7. The decedent executed two prior Last Wills and Testaments, one on May 29, 1963, and one May 4, 1960.

(a) Under the terms of the May 29, 1963, instrument the following bequests among others were made:

1. Baptist Home for Children, Bethesda, Maryland, $500.00.
2. Immaculate Conception Indian Mission School, Stephen Hyde County, South Dakota, $200.00.
3. Catholic Foreign Mission, Society of America, Maryknoll, P.O., New York, $1,000.00.
4. The Society of Catholic Medical Missionaries, Inc., Philadelphia 11, Pennsylvania, $1,000.00.
5. Father Flanagan's Boystown Home, Boystown, Nebraska, $1,000.00.
6. Holy Cross Foreign Mission Society, Washington, D.C., $1,000.00.
7. "It is my wish that whatever furniture or household effects she may not desire, I suggest she send them to the Holy Cross Foreign Mission Society, Washington, D.C."

8. One-fifth from sale of residence to Calvary Baptist Church, Washington, D.C.
9. One-fifth from sale of residence to Southern Theological Seminary, Louisville, Kentucky.
10. One-fifth from sale of residence to St. Benedict's Abbey, Benet Lake, Wisconsin.
11. One-fifth from sale of residence to St. Matthew's Cathedral, Washington, D.C.
12. One-fifth from sale of residence to New Subiaco Abbey, Subiaco, Arkansas.

(b) Under the terms of the May 4, 1960, instrument the following bequests among others were made.

1. To St. Benedict's Abbey, Subiaco, Logan County, Arkansas, $500.00.
2. To the National Shrine of the Immaculate Conception, Washington, D.C., 160 shares of common stock of E.I. Dupont, Newwurst Company to pay for a memorial window.
3. To St. Matthew's Catholic Church, Washington, D.C., 50 shares of Schering Corporation stock.
4. To Calvary Baptist Church of Washington, D.C., 50 shares of Schering Corporation stock.
5. To the Society of Catholic Medical Missionaries, Inc., Philadelphia, Pennsylvania, 50 shares of Schering corporation stock.
6. One-fourth residue of stock and securities to the Catholic Foreign Mission Society of America, Inc., Maryknoll P.O., New York.
7. One-fourth residue of stock and securities to St. Benedict's Abbey, Benet Lake, Wisconsin.
8. One-fourth residue of stock and securities to St. Labres Indian School, Ashland, Rosebud County, Montana.
9. One-fourth residue of stock and securities to Immaculate Conception Indian Mission School, Stephen Hyde, County, South Dakota.

10. One-third from sale of residence to Calvary Baptist Church, Washington, D.C.

11. One-third from sale of residence to St. Benedict's Abbey, Benet Lake, Wisconsin.

12. One-half residuary to the Society of Catholic Medical Missionaries, Inc., Philadelphia, Pennsylvania.

8. The Testatrix' husband, Dr. Bernard French, died before May 4, 1960, and was a member of the Catholic Church.

9. The Testatrix was a member of the Baptist Church.

10. None of the parties to this litigation know of any attempts by any members or representatives of either the Baptist Church or the Catholic Church to influence, cajole or otherwise persuade the Testatrix to make any bequests to them or their organizations.

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The Opinion of the Superior Court of the District of Columbia is reprinted in full in Appellants' Jurisdictional Statement at page 1b.

The Opinion of the District of Columbia Court of Appeals is reprinted in full in Appellants' Jurisdictional Statement at page 1a.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, et al.,

Appellants,

v.

MICHAEL M. DOYLE, et al.,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

The Appellee, Calvary Baptist Church, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District of Columbia Court of Appeals on the grounds (1) that this Court has no jurisdiction over this appeal under 28 U.S.C. § 1257(1); or (2) in the alterna-

tive, to affirm on grounds that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

I

THE DISTRICT OF COLUMBIA STATUTE INVOLVED AND NATURE OF THE CASE

A. Statute

This appeal involves the constitutionality of the District of Columbia statute, D. C. Code 1973 § 18-302, which provides that any devise or bequest to a clergyman or religious organization is invalid if made within 30 days of the testator's death.

B. The Proceedings Below

Sallye Lipscomb French executed a Will on October 13, 1972, in which she left one-third of her residuary estate to each Appellee, Calvary Baptist Church and St. Matthew's Cathedral. She died November 2, 1972, less than 30 days after execution of the Will. There is no evidence that Appellees had made any attempts to influence her choice of legatees. The Executor of the Estate instituted an action in the Superior Court of the District of Columbia seeking instructions on proper distribution of the Estate in light of D. C. Code 1973 § 18-302. Appellants, the decedent's heirs-at-law and next of kin, and the Appellee-Churches filed cross motions for summary judgment, raising the question of the constitutionality of District of Columbia statute, D. C. Code 1973 § 18-302. The trial court granted summary judgment in favor of Appellees, holding the statute violated both the due process clause of the Fifth Amendment and the free exercise clause of the First

Amendment (Juris. State. Append. B., pp. 1b-9b). Upon appeal, on November 1, 1976, the District of Columbia Court of Appeals affirmed the decision of the lower Court, 365 A.2d 621 (Juris. State. Append. A., pp. 1a-11a).

II

ARGUMENT

A. This Court Has No Jurisdiction To Review on Direct Appeal the Decision of the District of Columbia Court of Appeals in This Case Under 28 U.S.C. § 1257(1).

Title 28 U.S.C. § 1257 provides:

> § 1257. *State courts; appeal, certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against validity.
>
> * * *

This right of appeal is applicable only to "statute of the United States." Section 18-302 of the District of Columbia Code is a local District of Columbia statute enacted by Congress and applies only within the boundaries of the District of Columbia. It is not a statute of the United States enacted by Congress to be generally applicable throughout the United States. See: Preface to D. C. Code 1973 Edition which, in part, provides as follows:

"This is the sixth edition of the Code of Laws of the District of Columbia prepared and published pursuant to Title 1 U.S. Code, section 202. This edition contains all the general and permanent laws relating to or in force in the District of Columbia, on January 3, 1973, except such laws as are of application in the District of Columbia by reason of being laws of the United States, general and permanent in their nature."

See: *Griffin v. United States*, 336 U.S. 704, 713-715 (1949).

It has been rule of this Court not ordinarily to review decisions of Courts of the District of Columbia which are based on statutes that are limited or confined in operation to the District or which declare the common law of the District. *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

In considering its jurisdiction, this Court has interpreted the words "any law of the United States" contained in § 250 of the Judicial Code (Act of March 3, 1911, C. 231; 36 Stat. 1087) as not applicable to review of cases from the Court of Appeals of the District of Columbia. The Judicial Code § 250 provided that any final judgment or decree of the Court of Appeals may be re-examined in cases in which the construction of "any law of the United States" is drawn in question by the defendant. In the case of *American Security and Trust Co. v. Commissioners*, 224 U.S. 491 (1912), the Court held that § 250 of the Judicial Code should not be construed to apply to purely local laws of the District of Columbia. To the same effect, see *Washington, Alexandria, Mt. Vernon Railway Co. v. Downey*, 236 U.S. 190 (1915); *McGowan v. Parish*, 228 U.S. 312 (1913); *United Surety Co. v. American Fruit Products Co.*, 238 U.S. 140 (1915).

Had Congress wanted to allow direct appeals to the Supreme Court from the District of Columbia Court of Appeals, it would have been easy for it to have done so at the time of the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473. In fact, for jurisdictional purposes Title 28 U.S.C. § 1257 was amended to provide that for purposes of that section, the term "highest court of a State" included the District of Columbia Court of Appeals. Yet, no where in the Act did Congress provide that the words "statute of the United States" included acts passed by Congress which apply only within the boundaries of the District of Columbia. Compare: *Palmore v. United States*, 411 U.S. 389 (1973). Following this Court's practice of strict construction of statutes which authorize appeals, it is submitted that the Court has no direct jurisdiction over this appeal.

B. In the Alternative This Court Should Affirm the Judgment of the Court Below.

In the alternative, if the Court determines that it has jurisdiction of this cause by a direct appeal under § 1257(1) of the Judicial Code, or if the Court wishes to treat the Jurisdictional Statement as a petition for certiorari, Cf. 28 U.S.C. § 2103, the Court should affirm the judgment of the Courts below that the D.C. statute violated the First and Fifth Amendments of the United States Constitution. The decision of the Court below is clearly correct. The reasons set forth in the opinions of the Courts below fully support the decision of those Courts. Nothing further can be added at this point.

III

CONCLUSION

Wherefore, Appellee respectfully submits that the Motion to Dismiss should be granted because (1) the Court has no jurisdiction to entertain this direct appeal under Title 28 U.S.C. § 1257(1); or, in the alternative (2) that for the reasons stated in the opinions of the Courts below, the decision should be affirmed.

Resepctfully submitted,

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301/986-8600

Attorneys for Appellee
CALVARY BAPTIST CHURCH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Motion to Dismiss or Affirm was served by first-class mail, postage prepaid, this 18th day of February, 1977, on the following persons:

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Supreme Court, U. S.
FILED
MAY 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR JOHN W. KEY, *ET AL.*

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COURT OF APPEALS

BRIEF FOR JOHN W. KEY, *ET AL.*

OPINION BELOW

The Opinion of the District of Columbia Court of Appeals of November 1, 1976 is reported at 104 Wash. L. Rptr. 2061 (1976) and at 365 A.2d 621. (A. 16) The Opinion and Order of the Superior Court of the District of Columbia of February 13, 1975 is unreported. (A. 16)

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 1, 1976. On January 26, 1977, the Notice of Appeal to the Supreme Court of the United States was filed in the District of Columbia Court of Appeals. This Court postponed jurisdiction on March 21, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1257(1).

STATUTE INVOLVED

18 D.C. Code §302:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. D.C.C.E. §18-302, vol. 10, page 51.

QUESTIONS PRESENTED

1. Does Section 18-302 of the District of Columbia Code violate the free exercise clause of the First Amendment?

2. Does Section 18-302 of the District of Columbia Code create a classification which bears a rational relationship to its purpose so as not to violate the equal protection-due process guarantee of the Fifth Amendment?

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Michael M. Doyle, executor of the estate of Sallye Lipscomb French, filed a Complaint for Instructions in the Superior Court of the District of Columbia (Probate Division) (A. 5). There was a stipulation as to the material facts of the case and cross motions for summary judgment were filed by all the parties to the action. Hearing on the motions for summary judgment was had before Judge Theodore R. Newman, Jr. on January 29, 1975. On February 13, 1975, Judge Newman issued an Opinion and Order which found that 18 D.C. Code §302 violated the First and Fifth Amendments and which ordered that the estate of the decedent, Sallye Lipscomb French, be administered without regard to 18 D.C. Code §302 (A. 16). Appellants herein, the heirs-at-law of Sallye Lipscomb French, appealed from that Opinion and Order to the District of Columbia Court of Appeals which affirmed the decision of the Superior Court (A. 16). The appellate court held that the statute is invalid under equal protection and due process principles of the Fifth Amendment and therefore did not consider the First Amendment issues.

SUMMARY OF ARGUMENT

Section 18-302 of the District of Columbia Code is constitutional and does not violate either the First or Fifth Amendments of the Constitution of the United States.

I.

While the opinion of the District of Columbia Court of Appeals does not rest on First Amendment grounds it does affirm that of the Superior Court of the District of Columbia which held, in part, that the statute violates the free exercise of religion provisions of the First Amendment. The First Amendment issue is therefore addressed herein.

Section 18-302 regulates the testamentary transfer of property, a secular activity. The states have a legitimate interest in establishing inheritance laws and it is within their power under the Tenth Amendment to do so. The statute's effect is very limited, voiding only those testamentary transfers made within thirty days of testator's death. There are other areas in which the states' exercise of its police power has an indirect effect on the exercise of religion (e.g. Sunday Closing Laws) which have been sustained. Similarly 18 D.C. Code 302's indirect and limited effect on religions does not violate the free exercise clause of the First Amendment.

II.

Section 18-302 does not violate the equal protection-due process concepts of the Fifth Amendment as there is a rational basis for the statute.

The statute regulates a secular activity and, as indicated above, does not infringe on a fundamental constitutional right; nor does it contain a suspect classification. Therefore, a compelling state interest for the classification need not be demonstrated and the strict scrutiny test does not apply. The appropriate test is the rational basis test. This test is satisfied as evidenced by the stated purpose of the statute

> to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants. D.C. Code Encyclopedia, §18-302, page 54.

The statute can be said to create two classifications: (1) testators who die within thirty days of making their will vis à vis all other testators and (2) religious beneficiaries vis à vis all other beneficiaries. Both classifications bear a rational relationship to the purpose of the statute, the latter being particularly relevant as it is only a religion which offers salvation of the soul.

ARGUMENT

I.

18 D.C. CODE §302 REGULATES A SECULAR ACTIVITY AND DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U.S. at 669.

> No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

Section 18-302 neither respects the establishment (or de-establishment) of religion nor interferes with its free exercise. Like the tax exemption granted religion, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Sunday Closing Law, *Braunfeld v. Brown*, 366 U.S. 599 (1961), it is legislation having a secular purpose and dealing with a secular activity. It does not deny support to religions. Indeed, only a very limited group of gifts, those made by will executed within thirty days of testator's death, are eliminated. Nor is there evidence that over 100 years of the statute have resulted in the establishment or de-establishment of church or religion.

While the Exercise Clause prohibits the placement of governmental restrictions on the freedom of belief, the freedom to act in accordance with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown, supra*, at 603. *Braunfeld* upheld the Sunday closing law despite the economic burden placed on Orthodox Jewish merchants whose religion prohibits them from working on Saturday.

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. 366 U.S. at 606.

Any disadvantage caused by Section 18-302 is far less direct and objectionable than that associated with the Sunday Closing Law, for Section 18-302 affects *all* religious sects equally.

The states have a legitimate interest in and possess extensive power to establish rules of inheritance. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed. 2d 288 (1971). The disposition of property by will is governed solely by state statute. As the Supreme Court noted in *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1949), a long line of cases has

> consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. 339 U.S. at 91-92, 70 S.Ct. at 506, 94 L.Ed. at 681.

Thus, testamentary disposition of property is a secular activity which Congress (with respect to the District of Columbia) has deemed to be within its proper legislature purview; it does not constitute the exercise of religion.

Whether the Exercise Clause gives any "rights" to religions is questionable. The Clause was framed with the individual in mind and had as its purpose the prevention of persecution on account of one's religious beliefs or activities. It is true that religions rely on donations. But it is difficult to see how the very limited restriction of §18-302 constitutes an interference with religion's exercise of religion if, indeed, the First Amendment embodies such a concept at all.

Section 18-302 is not unique in its effect of restricting gifts to religious organizations. A spouse's renunciation of a bequest or devise under D.C. Code §19-113, for example, could have a similar effect on bequests in the same will to religious organizations. The First Amendment cannot be read to invalidate any such statute which might have the indirect effect of restricting gifts to religious organizations.

II.

18 D.C. CODE §302 DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Bolling v. Sharpe, 347 U.S. 497 (1954) reads the equal protection clause of the Fourteenth Amendment into the due process clause of the Fifth Amendment to apply it to the District of Columbia. Any unjustifiable discrimination is violative of due process under the test.

18 D.C. Code §302 regulates a secular activity, the testamentary transfer of property. This is an activity in which the state has a legitimate interest. *Labine v. Vincent, supra.* The purpose of the statute as stated in the Encyclopedic Commentary of the D.C. Code Encyclopedia, is "to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants." D.C. Code Encyclopedia, §18-302, page 54. The statute has a very limited and indirect effect on religion and therefore does not regulate a fundamental interest protected by the First Amendment.

18 D.C. Code §302 does not discriminate among religions nor does it tend toward the establishment (or de-establishment) of religion. In fact it is questionable whether 18 D.C. Code §302 makes a classification at all and therefore whether the equal protection concept applies. It is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. *See* 18 D.C. Code 101 *et seq.* "Any of the preconditions of valid execution of a will . . . can be manipulated into 'classifications.' " *In Re Estate of Cavill*, 329 A.2d 503, 508 (1974) (J. Pomeroy, dissenting).

Assuming, however, that 18 D.C. Code §302 creates classifications (see Summary of Argument, *supra*), they do not violate the equal protection aspect of the Fifth Amendment. Because, as indicated above, the statute does not regulate a fundamental interest protected by the First Amendment there need be no showing of a compelling state interest. The appropriate test of its validity is the rational basis test.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on groups wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.... *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The Court of Appeals at page 6 of its opinion quotes from *Reed v. Reed*, 404 U.S. 71, 76 (1971). At pages 75-76 of *Reed v. Reed, supra*, the following language appears:

> In applying [the Equal Protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated* to the objective of that statute. (Emphasis supplied.)

Here, not only are the classifications of the statute related to its objective but they bear a most rational relationship to the express legislative purpose (the "deathbed" theory, cited *supra*). Such concern for the public welfare is a proper governmental objective and in no way constitutes arbitrary action on the part of Congress.

The Court of Appeals notes at page 8 of its opinion that "Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, physicians, and charitable organizations, are not included in the statute. *See In re Small*, [100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972)]." Although the *position* may indeed be equal, the *influence* is far from equal. Religious organizations, unlike other persons or organizations, appeal to a testator's interest in the salvation of his soul. They can exert a particularly strong and unique influence on one whose death is but thirty days away. It was to avoid such deathbed bequests that the statute was passed.

The "strict scrutiny" test is applied when discrimination is shown to infringe on fundamental constitutional rights. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As already indicated 18 D.C. Code 302 constitutes no direct or substantial infringement of a fundamental constitutional right. While it is clear that a statute placing a condition upon the exercise of the right to vote requires such strict review, *Dunn v. Blumstein*, 405 U.S. 330 (1972), not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review, *Bullock v. Carter*, 405 U.S. 134 (1972). Thus it appears that only in cases where the restriction imposed by law "has a real and appreciable impact on the exercise of the franchise," *Bullock, supra* at 144, will the Court invoke the strict scrutiny test. The right to vote is no less fundamental a right than that regarding the free exercise of religion.

The "strict scrutiny" test is also applied when statutory classifications are based on suspect criteria, i.e. when the class possesses an "immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) or when the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See Johnson v. Robison*, 415 U.S. 361 (1974). Neither is the case with the classifications created by the instant statute.

Section 18-302, like the ordinance in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), prohibiting the sale of foodstuffs from pushcarts in the French Quarter by all vendors except those who had already been in business there for eight years, is in the nature of an economic regulation. When such a regulation

> is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical

> exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. (Citations omitted.) 427 U.S. at 303-304.

The fact that the statute may sometimes cause harsh results does not render it unconstitutional. It is designed to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation.

> In those cases where the rational basis test is appropriate, the concepts of overbreadth and underbreadth are irrelevant and there exists no requirement that the state demonstrate a statute drawn with mathematical precision. *In Re Estate of Cavill, supra* at 509 (dissent), citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

At page 8 of the Opinion of the Court of Appeals is expressed concern about an "irrebuttable presumption" of undue influence contained in the statute. Like the Pennsylvania statute in *In Re Estate of Cavill*, supra, 18 D.C. Code §302 Creates not a presumption but an express proscription against certain testamentary gifts. As J. Pomeroy (dissenting) in *Cavill* observed: "This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake." 329 A.2d at 510.

Since the statute expresses a proscription, there is no denial to the religious beneficiaries' right to be heard

because they had no such right. Before the guarantees of procedural due process attach, a complaining party must demonstrate that he possesses some recognized interest of life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-570, 92 S.Ct. 2740, 33 L.Ed. 2d 548, 556-557 (1972). Appellees have nothing more than an abstract need or desire or unilateral expectation of a benefit and consequently do not possess an interest sufficient to entitle them to be heard. *Board of Regents v. Roth, supra.*

Since the statute does not infringe on any First Amendment right (or contain suspect classification), since there is a rational basis for the classification, and since the protection of the heirs and next of kin is a legitimate governmental objective, the statute must stand free from the interference of the judicial branch.

> In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom—whether that of this Court or the legislature—is not determinative of legislative power. *In Re Estate of Cavill, supra* at 509 (dissent).

CONCLUSION

It is therefore respectfully submitted that the judgment of the District of Columbia Court of Appeals be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, ET AL., *Appellants,*

v.

MICHAEL M. DOYLE, ET AL., *Appellees.*

On Appeal from the District of Columbia Court of Appeals

BRIEF OF APPELLEE ST. MATTHEWS CATHEDRAL

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JURISDICTION

THE COURT DOES NOT HAVE APPEAL JURISDICTION AS THE LAW INVOLVED IS NOT A "STATUTE OF THE UNITED STATES"

Jurisdiction over this appeal was asserted in Appellants' Jurisdictional Statement (filed January 31, 1977) as based on 28 U.S.C. § 1257(1), on the grounds that D.C. Code § 18-302 is a "statute of the United States" and the decision below is against its validity. On March 21, 1977 this Court ordered that "Further

consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." Appellants' Brief, notwithstanding Rule 16(6) of the Rules of this Court, has not addressed the question of jurisdiction. For the reasons submitted in Argument I, *infra,* this Appellee submits that the Court is without jurisdiction of the appeal because D.C. Code § 18-302 is not "a statute of the United States" within the meaning of 28 U.S.C. § 1257(1).

THE COURT SHOULD NOT EXERCISE CERTIORARI JURISDICTION

This Court should not treat the Jurisdictional Statement as a Petition for a Writ of Certiorari under 28 U.S.C. § 1257(3), cf., *Palmore* v. *United States,* 414 U.S. 389, 396, 93 S.Ct. 1670, 1676 (1973), because this case presents neither a substantial federal question nor an issue that needs further elucidation as precedent. As will be shown in the Counterstatement of Facts and Argument, D.C. Code § 18-302 (the so-called D.C. "Mortmain statute") is unique in the United States in that it provides a proscription against only religious testamentary gifts. The District of Columbia, which stands to gain tax revenue by the continued validity of the statute, did not join in the appeal from the Superior Court and the United States has never entered the case, although given notice under Rule 47 of the Rules of the District of Columbia Court of Appeals, analogous to 28 U.S.C. § 2403. Thus, neither governmental entity apparently considers the issues substantial.[1]

[1] On February 28, 1972, the United States District Court for the District of Columbia, the Court then having probate jurisdiction in the District of Columbia, held D.C. Code § 18-302 unconstitutional as violative of the First Amendment. *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L.Rptr. 453 (Adm. No. 2507-70, D.D.C. 1972). As noted by the trial court below

> "Subsequent thereto, and so long as jurisdiction over probate matters remained vested in the United States District Court, all estates presenting issues under 18 D.C. Code 302 were administered without reference to that statute. No challenge was raised by the District of Columbia Government to the application of the *Small* ruling thereafter, so long as probate jurisdiction remained in the District Court. However, upon the transfer of probate jurisdiction to this Court, the District of Columbia seeks a redetermination of said issue by refusing to issue an Inheritance Tax Certificate required by Rule 14(e) of the Probate Rules of this Court unless the Executor amends his final account to delete the payment of legacies to the Little Sisters of the Poor, Calvary Baptist Church, and St. Matthews Cathedral. Whereupon, the Executor filed this complaint for instructions." (Jurisdiction Statement, Appendix B, 5b).

By its failure to join in an appeal of this case, the Government of the District of Columbia has now twice acquiesced in a decision of a District of Columbia Court invalidating the provisions of D.C. Code § 18-302.

STATEMENT UNDER RULE 33(2)(b)

In this proceeding the constitutionality of D.C. Code § 18-302 is drawn in question and 28 U.S.C. § 2403 may be applicable as the United States is not a party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Article I, Section 8, Clause 17
Article III, Section 1
Amendment 1
Amendment 5

28 U.S.C. § 1257(1)

D.C. Code § 18-302

The texts of the foregoing are contained in the Appendix to the Brief.

QUESTIONS PRESENTED FOR REVIEW

1

Whether an act of Congress applicable only to the District of Columbia, which has been invalidated by a District of Columbia Court, is a "statute of the United States" for the purpose of giving this Court appeal jurisdiction in cases where is drawn in question the validity of a statute of the United States, when the Congress, mindful of the case load of this Court, has otherwise in a series of acts clearly indicated that an act of only local applicability is not to be treated as a "statute of the United States."

2

Whether the classification created by a statute which voids testamentary gifts only to religious organizations but not to charities (even those owned and operated by religious organizations), even when the testator is not survived by any heirs at law and next of kin, bears any rational relation to the statutory purpose of protecting the testator from undue religious influence and his family from disinheritance.

3

Whether there is any compelling governmental need for a statute which voids only religious testamentary gifts, when any other bequest or devise may be avoided only upon a showing of demonstrable undue influence.

4

Whether a statute, adopted for the purpose of preventing a testator from being subjected to undue religious influence in the making of a will to the derogation of family, which requires for the validity of only

testamentary gifts to religious organizations that the testator survive the execution of the will in which such gifts are made by 30 days, infringes the "free exercise" rights of a religion to solicit the testator for a bequest or devise and the testator to make one.

COUNTERSTATEMENT OF THE CASE

The Testatrix, Sallye Lipscomb French, a member of the Baptist Church, died on November 2, 1972, after having executed a Last Will and Testament on October 13, 1972, and a Codicil (which is not involved in this litigation) on October 26, 1972 (Appendix, hereinafter A., 11, 14). By this Will she left one-third of her residuary estate (which did not contain real estate) to the Appellee, the Calvary Baptist Church, and one-third to this Appellee, St. Matthews Cathedral, to which under Canon Law the ordinary, the Roman Catholic Archbishop of Washington, takes title (A. 11).

The Testatrix survived her husband, Dr. Bernard French, a member of the Catholic Church, by twelve years (A. 14). After his death she executed two wills previous to the one in question, namely one in 1960 and one in 1963 respectively, by which she made several religious bequests to both the Baptists and the Catholics (A. 12, 13). It was stipulated by all parties that none knew ". . . of any attempts by members of either the Baptist Church or the Catholic Church to influence, cajole or otherwise persuade the Testatrix to make any bequests to them or their organizations" (A. 14).

Michael M. Doyle, Executor of the Estate of Sallye Lipscomb French, commenced the action below by filing a Complaint For Instructions (A. 3) when the

Finance Office of the Government of the District of Columbia refused to issue a Tax Certificate showing that the District of Columbia inheritance tax liability had been discharged,[2] because that office asserted the distribution of two-thirds of the residue of the estate to St. Matthews Cathedral and the Calvary Baptist Church pursuant to the terms of the Will would be in violation of the District of Columbia so-called "Mortmain statute" (D.C. Code § 18-302), inasmuch as the Testatrix had died on November 2, 1972, within thirty days of executing the Will by which the legacies voided by this Statute were made.[3]

In his Complaint For Instructions, the Executor asserted that these two bequests were valid and that the Tax Certificate should issue because the United States District Court for the District of Columbia had previously found the District of Columbia Mortmain statute unconstitutional as a violation of the First Amendment to the United States Constitution, in the case of *In Re: Small,* 100 Daily Wash.L.Rptr. 453 (Admin. No. 2507-70, D.D.C. Feb. 7, 1972) (A. 5-9). The District of Columbia, which had neither intervened nor been named a party in the *Small* case,

[2] Under Rule 14(e) SCR-PD of the Superior Court Rules of the Probate Division, a Tax Certificate must be filed with the Probate Division of the Superior Court before an Executor's Final Account showing distribution can be approved.

[3] The Complaint also alleged the validity of a separate bequest to the Little Sisters of the Poor. That bequest was found not to be within the proscription of D.C. Code § 18-302 upon Motion by Summary Judgment by reason of D.C. case law declaring the legatee not to be a sectarian institution within the meaning of the Statute. No appeal was noted from that decision of December 19, 1974 (Jurisdictional Statement, Appendix B, 2b, Appendix A, 4a, 5a).

was named as a substitute Defendant as were Appellants John W. Key (decedent's brother) and eleven nieces and nephews of decedent (being the only heirs at law and next of kin), as well as the two religious residuary legatees, Appellees St. Matthews Cathedral and the Calvary Baptist Church (A. 9).[4]

William W. Baum, Roman Catholic Archbishop of Washington, a corporation sole (A. 11), answered the Complaint on behalf of St. Matthews Cathedral annd asserted the unconstitutionality of the District of Columbia Mortmain statute. The Calvary Baptist Church also answered and made that assertion.

John W. Key and the other collateral heirs at law and next of kin answered the Complaint and asserted the validity of the District of Columbia Mortmain statute.

After a hearing in January 1975, the Probate Division of the Court issued a ten-page opinion and Order on February 13, 1975, by which it found that there was neither a rational basis for, nor a compelling state interest in, the arbitrary classification of bequests made by the District of Columbia Mortmain statute and hence, the statute (D.C. Code § 18-302) violates the Fifth Amendment. It also held that the statute affected a fundamental interest protected by the First Amendment and unconstitutionally infringed the free exercise of religion protected thereby (Jurisdictional Statement, Appendix B). The Court also ordered that its ruling apply to all probate cases

[4] The remaining one-third of the residuary estate was bequeathed to the John Hopkins University, and was not subject to D.C. Code § 18-302 (Jurisdictional Statement, Appendix B, 3b).

administered in the Superior Court of the District of Columbia. From this Order the heirs at law and next of kin appealed, but the District of Columbia, however, did not (A. 4).

The Appellees in the District of Columbia Court of Appeals gave appropriate notice under Rule 47 of the Rules of that Court that Appellees intended to draw into question the constitutionality of D.C. Code § 18-302, but neither the United States nor the District of Columbia appeared (A. 1, 2).

The District of Columbia Court of Appeals affirmed, but did not reach the First Amendment question, as its decision was based on the grounds that the statute was invalid as the classification established between gifts to religious institutions and gifts to charitable organizations (even those owned and operated by religious institutions) bears no rational relationship to the purpose of the legislation, *i.e.*, to preclude deathbed gifts to religious organizations by persons who might be unduly influenced by religious considerations, and hence, the statute denies religious legatees equal protection and due process of law under the due process clause of the Fifth Amendment. While agreeing with the decision of the Court, the then Chief Judge Reilly, in a concurring opinion, felt that the Court should have invalidated the statute on First Amendment grounds, as the objective of the statute, precisely forbidden by the "free exercise" clause, is to prevent the clergy from exercising a constitutional right to solicit contributions by representations, and that such objective is premised upon the assumption that such representations are false and hence Congress can enact safeguards against their effect.

SUMMARY OF ARGUMENT

This case presents two basic issues for consideration in this Court.

The first issue is whether this Court possesses appeal jurisdiction under 28 U.S.C. § 1257(1) when the District of Columbia Court of Appeals has invalidated on constitutional grounds a provision of the D.C. Code of local applicability. Both the statutes and cases indicate that there is no such appeal jurisdiction in this Court, and, as a corollary, Appellee submits that the case should not be reviewed under certiorari jurisdiction as the D.C. statute in question (the so-called "Mortmain statute") is unique in that it is dissimilar from the Mortmain statutes in other states, as well as the traditional English Mortmain statute because it restricts only religious bequests and devises.

The second issue, which need be addressed only if this Court should review the case by appeal or certiorari, is whether the Court below erred in invalidating said Mortmain statute. As will be developed in the Brief, Appellee submits that the statute is invalid on the basis of either the Fifth or First Amendments to the Constitution, and that the decision below applied the correct tests as prescribed by this Court in holding the statute repugnant to the Constitution.

THE ARGUMENT

I

THE DISTRICT OF COLUMBIA MORTMAIN LAW D.C. CODE § 18-302 IS NOT A "STATUTE OF THE UNITED STATES" WITHIN THE MEANING OF 28 U.S.C. § 1257(1) CONFERRING APPEAL JURISDICTION UPON THIS COURT WHERE THE VALIDITY OF A STATUTE OF THE UNITED STATES HAS BEEN DRAWN IN QUESTION

Appellants assert that D.C. Code § 18-302 is a "statute of the United States" within the meaning of 28 U.S.C. § 1257(1). Appellee's position is simply that while any Act of Congress is a statute of the United States (under Article III, Section 2 of the Constitution), Congress does not intend laws applicable only in the District of Columbia to be "statutes of the United States" for purposes of the Court's appeal jurisdiction under 28 U.S.C. § 1257(1).

A

THE COURT HAS NOT PREVIOUSLY HELD THAT A PROVISION OF THE D.C. CODE IS A "STATUTE OF THE UNITED STATES" WITHIN THE MEANING OF 28 U.S.C. § 1257(1)

Until the District of Columbia Court Reform and Criminal Procedure Act of 1970 (84 Stat. 473 [1970]) made the District of Columbia Court of Appeals an Article I court (84 Stat. at 475), the highest court in the District of Columbia (84 Stat. 475, D.C. Code § 11-102) and, for the purposes of appeal jurisdiction of this Court under 28 U.S.C. § 1257, the "highest court of a state" [84 Stat. 590, 28 U.S.C. § 1257], Section 1257 had never been applicable to either an Article I or Article III court in the District of Columbia. Theretofore, appeals from the District of Columbia Court of Appeals lay to the United States Court of Appeals for

the District of Columbia Circuit, which this Court could review under 28 U.S.C. § 1254. There has not previously been an occasion for this Court to consider its appeal jurisdiction under 28 U.S.C. § 1257(1) in an appeal from the District of Columbia. Thus, there are few pertinent cases on the question of what constitutes a "statute of the United States" under 28 U.S.C. § 1257(1).

The propriety of appellate review by this Court of final state court decisions nullifying federal law is implicit in the constitutional provision for the supremacy of federal law (Article VI, Clause 2), and the judicial power of the United States (Article III, Section 1) as articulated in *Martin* v. *Hunter's Lessee,* 1 Wheat 304, 4 L.Ed. 97 (1816) wherein the provisions of Section 25 of the Judiciary Act of 1789 (1 Stat. 85 [1789]), were upheld. In *Cohen* v. *Virginia,* 6 Wheat 262, 5 L.Ed. 257 (1821), that section, the forerunner in concept of 28 U.S.C. § 1257(1), was held to provide appellate review of a case where a Virginia court held the District of Columbia Organic Act could not authorize the territorial legislature of the District of Columbia to pass a lottery act which would immunize its citizens from prosecution under Virginia gambling laws for selling lottery tickets in Virginia. There is, however, an arguable necessity for this Court's appeal jurisdiction of a state court's decision nullifying a federal law, because a state is not under the control of the Congress or the President and such nullification could not otherwise be corrected. No such necessity is presented for appellate review of decisions of the District of Columbia Court of Appeals, as it is an Article I court over which Congress has plenary power. Any needed review is always available pursuant to 28 U.S.C. § 1257(3) as

noted in *Swain* v. *Pressley,* —— U.S. ——, 97, S.Ct. 1224, 1235 (1977) (note 16).

B

PREVIOUS STATUTES PROVIDING THE APPEAL JURISDICTION OF THIS COURT FROM DISTRICT OF COLUMBIA COURT CASES ARE NOT DEFINITIVE AUTHORITY

1

Early Appeal Jurisdiction

The first court in the District of Columbia was the Circuit Court of the District of Columbia (2 Stat. 105 [1801]) from which this Court could review judgments in excess of $100 by appeal or writ of error (2 Stat. 106 [1801]). In 1816 the amount needed for appeal jurisdiction was raised to $1000 (3 Stat. 261 [1816]). In 1863 the Circuit Court of the District of Columbia was abolished and in its place was established the Supreme Court of the District of Columbia (12 Stat. 762 [1863]). This Court could review decisions of the general term of the Supreme Court by appeal or writ of error on the same basis as had theretofore existed for the Circuit Court of the District of Columbia (12 Stat. 764 [1863]). In 1885 the appeal jurisdiction was set at $5000 but for the first time federal question jurisdiction was added, the statute providing for appeal jurisdiction without regard to the sum in

> "... any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under The United States ...." 23 Stat. 443 (1885).

There was, however, no clear Congressional intent to limit this Court's appeal jurisdiction by this act. In

Baltimore & P.R.Co. v. *Hopkins,* 130 U.S. 210, 9 S.Ct. 503 (1889), an appeal case from the Supreme Court of the District of Columbia under this jurisdictional statute (23 Stat. 443 [1885]), the Court determined that there was no question raised as to the validity of a local Railway Act and thus did not reach the question as to whether such act was a "statute of the United States."

In 1893 a new Court of Appeals was established for the District of Columbia known as the Court of Appeals of the District of Columbia which succeeded to the appellate power of the general term of the Supreme Court of the District of Columbia whose appellate jurisdiction was abolished. 27 Stat. 434 (1893). This Court was given appeal jurisdiction over the Court of Appeals for the District of Columbia.

> "... without regard to the sum or value of the matter in dispute, wherein is involved the validity of ... a treaty or statute of or an authority exercised under the United States." 27 Stat. 436 (1893).

In the cases decided under these appeal statutes this Court infrequently commented upon its appeal jurisdiction.

In *Parsons* v. *District of Columbia,* 170 U.S. 45, 18 S.Ct. 521 (1898) in a writ of error case on review under the same jurisdictional statute as was involved in *Baltimore & P.P.Co.* v. *Hopkins, supra,* where the validity of an Act of Congress involving District of Columbia water main assessments was questioned the Court noted at p. 523 "... we think it plainly appears that the validity of statutes of the United States and of an authority exercised under the United States was

drawn into question. . . ." But in *Bauman* v. *Ross,* 167 U.S. 548, 17 S.Ct. 966 (1897), and *Wright* v. *Davidson,* 181 U.S. 371, 21 S.Ct. 616 (1901) there was no discussion of jurisdiction. In *Smoot* v. *Heyl,* 277 U.S. 518, 33 S.Ct. 336 (1913), however, the Court held it had appeal jurisdiction in a suit challenging building regulations as an authority exercised under the United States.

2

The First Attempt To Limit The Court's Appeal Jurisdiction From District Of Columbia Courts

In 1911, Congress adopted a new Judicial Code which abolished appeals from the District of Columbia in all cases involving a sum in excess of $5,000 (36 Stat. 1168) and substituted in § 250 (36 Stat. 1159) six classes of cases from which appeals might lie.

The applicable subparts of § 250 of the 1911 Code provided,

> "Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority."
>
> * * *
>
> "Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant." 36 Stat. 1159 (1911) (emphasis supplied).

In *American Security & Trust Co.* v. *Commissioners,* 224 U.S. 491, 32 S.Ct. 553 (1912), another condemnation case from the District of Columbia, the Court

found that the abolition of appeal jurisdiction for cases involving $5,000 or more in favor of appeals only involving a federal question very significant. Ignoring the other change of language from "any case" and "a statute of the United States" to "cases" and "any law of the United States" the Court held that it did not have appeal jurisdiction under § 250 (Sixth) of the code. The Court (Mr. Justice Holmes) stated on page 554:

> "Of course there is no doubt that the special act of Congress was, in one sense, a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: "Cases involving the constitutionality of any law of the United States." Parsons v. District of Columbia, 170 U.S. 45, 42 L.ed. 943, 18 Sup.Ct.Rep. 521. But it needs no authority to show that the same phrase may have different meanings in different connections. Some reasons for strict construction apply here. We are entirely convinced that Congress intended to effect a substantial relief to this court from indiscriminate appeals where a sum above $5,000 was involved, and to that end repealed the former act. See Carey v. Houston & T.C.R. Co. 150 U.S. 170, 179, 37 L.ed. 1041, 1043, 14 Sup.Ct.Rep. 63; Cochran v. Montgomery County, 199 U.S. 260, 272, 273, 50 L.ed. 182, 188, 26 Sup.Ct.Rep. 58, 4 Ann. Cas. 451. But all cases in the District arise under acts of Congress, and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants, the appellate jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result.

"A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is Church of the Holy Trinity v. United States, 143 U.S. 457, 36 L.ed. 227, 12 Sup. Ct.Rep. 511; we may refer further to Cochran v. Montgomery County, ubi supra. In the case at bar, if the words "construction of any law of the United States" are confined to the construction of laws having general application throughout the United States, the jurisdiction given to this court by § 250 is confined to what naturally and properly belongs to it."

In *McGowan* v. *Parish,* 228 U.S. 312, 33 S.Ct. 521 (1913) a case in which a question arose concerning the statute providing for the assignment of claims against the U.S., the Court (Mr. Chief Justice White) allowed the appeal under § 250(Sixth) noting at page 523, that,

"The duty in every case, therefore, arises where the right to appeal under the section is invoked, to ascertain whether the case substantially involves the construction of a law in the appealable sense. The fact that the court below, in the nature of things, must be constantly called upon to apply and enforce laws of the United States, local in character, admonishes us that when called upon to determine whether the right to an appeal exists, to be more than usually circumspect to see to it that the authority to review, conferred in one class of cases, be not permitted to embrace the other and large class of cases to which it does not extend."

In *Washington, A. & Mt. V. R. Co.* v. *Downey,* 236 U.S. 190, 35 S.Ct. 406 (1915), where an appeal was sought involving the Employer's Liability Cases under § 250(Sixth) the Court dismissed the appeal because

the subject statute had been held unconstitutional as a federal law and constitutional as an Article I (District of Columbia) law, thus, there was no question presented involving a law of the United States. The Court stated that the test of whether a law was local was to be determined by reference to which authority Congress relied upon for its passage, *i.e.,* Article I or Article III. The case of *Newman* v. *Frizzell,* 238 U.S. 537, 35 S.Ct. 881 (1915), presents a similar analysis. In this case the Court held at page 552/885 that certain sections of the D.C. Code are "to be treated as general laws of the United States, not as mere local laws of the District. Being a law of general operation, it can be reviewed on Writ of Error from this Court."

In *United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140, 35 S.Ct. 828 (1915), a case involving a question under the D.C. Code which was sought to be appealed under § 250(Third), the Court, while remarking that the question of whether § 250(Third) applied to acts of Congress of local applicability had been left open in *American Security & Trust Co.* v. *Commissioners, supra,* dismissed the writ of error for want of jurisdiction under § 250(Third) stating that the alleged constitutional point was "a mere pretext put forward in order to open other questions that otherwise could not come here."

In *Heald* v. *District of Columbia,* 254 U.S. 20, 41 S.Ct. 42 (1920) the Court, noting that § 250(Third) was in fact broader in scope than § 250(Sixth) because § 250(Third) dealt with questions of the constitutionality of a law of the United States whereas § 250

(Sixth) dealt with questions of the construction of laws of the United States, held an appeal would lie in a case involving the constitutionality of a District of Columbia statute under § 250(Third). The Court relied upon *Parsons, supra,* and *Smoot, supra,* stating that § 250(Third) merely reenacted the jurisdictional statute previously found to embrace District of Columbia laws.

There is some *dicta* in *Marine Ry. & Coal Co., Inc.* v. *United States,* 257 U.S. 47, 42 S.Ct. 32 (1921) to the effect that the rule of decision in *American Security & Trust Co., supra,* should not apply to the circumstance of a statute defining the territorial extent of the District of Columbia in the Potomac River.

In *Corrigan* v. *Buckley,* 271 U.S. 323, 46 S.Ct. 521 (1926) an appeal was allowed and then dismissed for want of a substantial question under § 250(Third) where Federal Civil Rights Laws were involved. No discussion of local versus federal jurisdiction was raised.

In 1925, Congress abolished the separate provision for this Court's appeal jurisdiction from the District of Columbia contained in § 250 of the 1911 Judicial Code, 43 Stat. 941 (1925), and provided for review in like fashion as that available for review of decisions in the other Federal Circuit Courts of Appeals. 43 Stat. 938-9 (1925). After 1925, review in this Court of D.C. cases was put on the same basis as review of any decision from a U.S. Court of Appeals until the District of Columbia Court Reform and Criminal Procedure Act of 1970. 84 Stat. 473 (1970).

C

THE DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970 AND OTHER RECENT ACTS FURTHER RESTRICT THE TERM "STATUTE OF THE UNITED STATES"

By District of Columbia Court Reform Act and Criminal Procedure Act of 1970 (84 Stat. 473 [1970]) Congress transformed the District of Columbia Court System into two categories of Courts, Article I (Superior Court and District of Columbia Court of Appeals) and Article III (United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit) 84 Stat. 475. Cf. *O'Donoghue* v. *United States,* 289 U.S. 516, 53 S.Ct. 740 (1933) (District of Columbia Courts are Article III courts). The Aritcle I Courts were designed to function in a manner analogous to state courts. For example, the House Report No. 91-907 pp. 34-5 states,

> "In constituting the lower trial court as a purely local court, similar to a state court, it follows that appeals from the local court should be treated like those in the State systems, and that the channel of appeals should be directly to the United States Supreme Court. The reorganization recommended here makes the District of Columbia Court of Appeals the highest local court, with expanded powers in scope of review and rulemaking. Its decisions will be appealable directly to the United States Supreme Court. This provision removes the existing double level of appeals through the local circuit court. The structure of both appeals courts is changed: when the recommended transfers are accomplished, the local appeals court will have jurisdiction comparable with State courts; and the Federal appeals court will be comparable to other Federal appeals courts.

"The jurisdictional changes recommended by your Committee will result in a Federal-State court system in the District of Columbia analogous to court systems in the several States."

The concept is confirmed in the Senate report, p. 5,

"Likewise, the local appellate court, the District of Columbia Court of Appeals, is to be the highest court of this jurisdiction, the final authority, as to purely local matters and for purposes of appeal to the Supreme Court of the United States."

The reports, however, are not clear exactly what is meant by appeal beyond the face of 28 U.S.C. § 1257 (1). In the Hearings Before Commitee on the District of Columbia in the U.S. Senate on Crime In The National Capital, Part 1, March 11 & 12, 1969 at page 1159 appears this colloquy,

"The Chairman: on page 3, section 11-102 there is a provision relating to appeal:

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. For purposes of appeal to the Supreme Court and other purposes of law, it shall be deemed the highest court of the state.

"Now, my question to you is a question raised about that language. Is that sufficintly broad to allow the Supreme Court review by certiorari.

"Mr. Kleindienst. We believe so.

"The Chairman. As well as appeal pursuant to 28 U.S.C. 12750? [sic.] Because the language you know, leaves out certiorari. Certiorari is an important vehicle to reach the Supreme Court.

"Mr. Kleindienst. We believe the language covers certiorari but it would be easy to clarify."

In the District of Columbia Court Reform and Criminal Procedure Act of 1970 Congress clearly indicated that distinctions between "statutes of the United States" and "statutes of the District of Columbia" was of jurisdictional importance if the new District of Columbia courts under Article I were to be able to function as the local courts and the United States District Court for the District of Columbia was to be able to function as an exclusively Article III court. In Section 172c of the Act (84 Stat. 590), Congress added § 1363 to Title 28 of the United States Code, which provides,

"§ 1363 Construction of references to laws of the United States or Acts of Congress.

"For the purposes of this chapter, references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia."

This statutory definition is of significance since it was adopted after this Court's statement in *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969) (footnote 4 at page 625/1326), that *any* Act of Congress within the meaning of 28 U.S.C. § 2282 (Three Judge Court) includes a District of Columbia statute. The Court reasoned as follows,

"In Ex parte Cogdell, 342 U.S. 163, 72 S.Ct. 196, 96 L.Ed. 181 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U.S.C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly

> resolved. However, in Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. *See, e.g.,* Hobson v. Hansen, 265 F.Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "*any* Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia."

Congress has now taken steps to reduce the number of such cases by repealing 28 U.S.C. § 2282 entirely. 90 Stat. 1119 (1976).

In another area the Congress has further restricted appeals to this Court where appeal heretofore lay involving Acts of Congress which this Court has held included statutes of the District of Columbia. This Court held in *United States* v. *Vuitch,* 402 U.S. 62, 91 S.Ct. 1294 (1971), that the words "statute upon which the indictment is founded" in 18 U.S.C. § 3731 applies to a District of Columbia abortion law because the Criminal Appeals Act (18 U.S.C. § 3731) contains no language that purports to limit or qualify the term "statute." The Congress, however, had redirected such appeals to the United States Court of Appeals before the date of decision.

Congress also deleted the words "statute upon which the indictment is founded" in its amendment of 18 U.S.C. § 3731. In the conference report No. 91-1768 it is noted that the Senate Bill had provided that "Government appeals were required to be taken to a Court of Appeals unless the decision was based at least in part

on a determination of the invalidity of an Act of Congress. . . ." 1970 U.S. Code Cong. & Adm. News 5848. The report further stated, "Although the conference substitute does not provide for direct appeal to the Supreme Court, it is recognized that under Section 1254 of Title 28, United States Code, cases in the Courts of Appeal may be reviewed by the Supreme Court directly." *supra,* p. 5849. As a result, the Court stated "the end of our problems with this Act is finally in sight." *United States* v. *Weller,* 401 U.S. 254, 255, 91 S.Ct. 602, 604 (1971).

Apparently unconvinced by the cases, although citing none and citing no significant legislative history, one writer has suggested that the words "statute of the United States" in 28 U.S.C. § 1257(1) nevertheless include provisions in the District of Columbia Code, *see* 59 Geo. L. J. 492-3. It is the position of Appellee that the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, is of significance in interpreting Congressional intent as to the meaning of "statute of the United States." That the District of Columbia Code is not a state statute, *Palmore* v. *United States,* 411 U.S. 389, 93 S.Ct. 1670 (1973), does not mean that it is a statute of the United States. We duly note that the Court has admonished,

> "Jurisdictional statutes are to be construed "with precision and the fidelity to the terms by which Congress has expressed its wishes . . . and we are particularly prone to accord "strict construction of statutes authorizing appeals" to this Court." *Palmore, supra* p. 396/1675 (citations omitted).

It is incumbent upon Appellants to demonstrate this Court's jurisdiction in this appeal and Appellants have not even addressed the question, much less made a

showing. We think Congress has made it clear that a law of the District of Columbia is to be treated as something less than a statute of the United States. Were this Court to assume jurisdiction over this appeal it would be taking a step backward; toward the position it shunned in *American Security & Trust, supra.* In that case the Court reasoned that a construction of a jurisdictional statute, passed to reduce the number of appeals, which would have the effect of increasing the number of appeals, was unreasonable and unintended. The same rationale applies to this case. Now that 28 U.S.C. § 2282 has been repealed, if this case were to have arisen from the Article III courts in the District of Columbia only certiorari would be available to this Court under 28 U.S.C. § 1254. Inasmuch as the Congress itself distinguishes between statutes of the United States and those of the District of Columbia by its separate publication of the U.S. Code and D.C. Code, 1 U.S.C. § 201 *et seq.,* it would be unreasonable to think that Congress contemplated when it attempted to transform the District of Columbia Court of Appeals into the highest court of a state, that appeal jurisdiction from its decisions would encompass a larger number of cases than those from an actual state court.

But this would be just the result if the Court has appeal jurisdiction in this case. When a state court holds a state statute unconstitutional there is no appeal to this Court. Surely Congress did not intend in creating the District of Columbia Court of Appeals to allow appeal jurisdiction to this Court when the District of Columbia Court of Appeals holds a provision of the District of Columbia Code unconstitutional. To do so would be to expand the appeal jurisdiction under 28 U.S.C. § 1257(1) rather than to reduce it. Thus, we

think Congress has chosen to limit the appellate jurisdiction of this Court to cases involving the validity of statutes of the United States only of general application and not to those of purely local applicability. The crucial distinction between these two types of statutes was recognized by Congress in publishing its own statutes, the District of Columbia Court Reform and Criminal Procedure Act of 1970, and in its continuing effort to lessen the case load of this Court.

Under these circumstances Appellee submits that the Court does not possess appeal jurisdiction and should therefore dismiss the appeal.

II

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE IS UNIQUE BECAUSE IT DISCRIMINATES ONLY AGAINST BEQUESTS AND DEVISES TO RELIGIOUS ORGANIZATIONS FOR RELIGIOUS PURPOSES

A

THE CONSTRUCTION OF THE STATUTE BY DISTRICT OF COLUMBIA COURTS

The District of Columbia Mortmain statute is unique[5] within the United States as a restriction on testamentary alienation of property by voiding only religious devises and bequests if made in a will or codicil executed within thirty days of death. The statute provided as follows:

> "A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious

[5] 54 N.C.L.Rev. 431 note 71 at 437 (1976); *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L. Rptr. 453 (Adm. No. 2507-70 D.D.C. 1972).

sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator." Sept. 14, 1965, Pub.L. 89-183, § 1, 79 Stat. 688, D.C. Code § 18-302 (1973 ed.).

As seen by the opinion below (Jurisdictional Statement, Appendix A), the District of Columbia courts, with the concurrence of this Court, have construed the Mortmain statute so as to invalidate those bequests to religious organizations only when not used for charitable purposes, *i.e.,* non-sectarian bequests are valid, even if to a religious organization, *see Colbert* v. *Speer,* 24 App.D.C. 187 (1904), *aff'd,* 200 U.S. 130, 26 S.Ct. 201 (1906) (Georgetown University, St. Vincent's Orphan Asylum and St. Joseph's Orphan Asylum are not sectarian although owned and operated by Orders of the Roman Catholic Church); *Estate of Susan Evelyn Murray,* Adm. No. 29831 (D.C. Supreme Ct. Dec. 26, 1924) (Little Sisters of the Poor, A Roman Catholic Order); *In Re*: *Estate of Mariette Little,* Adm. No. 34,929 (D.C. Supreme Ct. Nov. 13, 1928) (Board of Relief of the Presbyterian Church); *In Re*: *Estate of Henry Kroger,* Adm. No. 1901-67 (D.D.C. May 6, 1968) (Salvation Army); Bequest Invalid, *see McInerney* v. *District of Columbia,* 122 U.S. App. D.C. 413, 355 F.2d 838 (1965) (Society of Perpetual Adoration); *see also Long* v. *Gloyd,* 25 W.L.Rptr. 50 (S.Ct. 1897) (bequest to priest as an individual and not as a priest as such is valid).

In view of the Court Reform Act and this Court's longstanding reluctance to review the interpretation of local law by D.C. courts, this Court should give due deference to the interpretation and construction of the

District of Columbia Mortmain Law over the years by the courts as enunciated in the decision below, since the manifest intent of Congress is that the new Article I courts in the District are to be analogous to state courts. Indeed, this court has so stated. *Pernell* v. *Southall Realty,* 416 U.S. 363, 94 S.Ct. 1723 (1974), *accord* as to Article III courts, *Del Vecchio* v. *Bowers,* 296 U.S. 280, 56 S.Ct. 190 (1935).

B

THE LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA MORTMAIN STATUTE

The D.C. Mortmain statute has its origin in the 34th section of the Maryland Declaration of Rights, adopted in 1776 which provides:

> "That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in truth for, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use, or benefit; as also every devise of goods or chattels to, or to or for the support, use or benefit of, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination, without the leave of the legislature, shall be void; except always any sale, gift, lease, or devise, of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be improved, enjoyed or used, only for such purpose, or such sale, gift, lease or devise, shall be void." (Line 5, word 4, read trust)

Contrary to first appearances, the purpose of the 34th section of the Maryland Declaration of Rights of 1776 was not anti-religious, but rather an attempt to extend the protection of the state to all religious groups and not merely to the previously established church as explained by Dr. Hanley.

> "What did the state do for the denominations specifically, besides granting special recognition of Christianity and its influence? The direct action of the old regime was exclusively toward the established church. The provincial government gave property to the parishes, both in land and buildings. Glebe-land, as a benefice to a clergyman, and taxes yielded a constant income to the parish, its rector and curates. Only clergy of the Establishment claimed salaries and aid from the province. What impact did the Revolution have on these arrangements? Examination of the constitution and other legal provisions will reveal striking changes, which were unavoidably involved in politics, touching other religious groups as well as the succession of the formerly Established Church. The constitutional convention acted to safeguard the legal status of property held by all denominations. This was essential to them. "As they were all treated equitably," Duke observed, "and every party left in possession of what was properly its own, there were no complaints made." This was surely an accurate commentary on Article 34 of the Declaration of Rights.
>
> "This article gave assurance not only of title to property, but to its use and transmission, so essential to any growing religious congregation. The state undertook to make good by legal force any of these matters submitted to it for sanction. The "gift, sale, or devise of land," which were intended as benefits to ministers or similar persons, denominations or religious orders, were honored. These

> benefits were, under such legal conditions, valid, "in succession, or . . . after . . . death . . . and also . . . for the support, use or benefit of any minister, public teacher or preacher of the gospel, as such, or any religious sect, order or denomination . . ." This legislation gave the government some control in return for such legal benefits. Proposals for incorporation and other arrangements possible by Article 34 had to be approved by the assembly. St. Paul's Parish, for example, was strictly held to a stipulated formula for distributing its annual rents. The assumption was, however, that revision of the conditions of incorporation was possible by a new petition of the assembly. The rights of church petitioners were so exact and detailed that it would seem the assembly could not but concur in any provisions for incorporation." Thomas O'Brien Hanley, *The American Revolution & Religion,* 60, 61 (1971).

The Maryland Declaration of Rights, including paragraph 34, was made applicable to the District of Columbia by the Organic Act of 1801, 2 Stat. 103, ch. 15, sec. 2. In 1866 Congress repealed its adoption of the 34th section of the Maryland Declaration of Rights, but added a proviso to its repeal which is the predecessor to the present D.C. Code provision. The Repeal Act provides as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the thirty-fourth section of the Declaration [of] Rights of the State of Maryland, adopted seventeen hundred and seventy-six, so far as the same has been recognized and adopted in the District of Columbia, be, and the same is hereby, repealed and annulled, and that all sales, gifts, and devises prohibited by the said section, or by any law passed in accordance therewith,

> shall be, when hereafter made, valid and effectual: Provided, That, in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." 14 Stat. 232, ch. CCXXXVII (July 25, 1866).

The 1866 repeal and proviso was originally introduced as House Bill #564 merely to repeal the 34th section of the Declaration of Rights so that a citizen of the District of Columbia could make a gift of 10 to 12 thousand dollars for the purpose of building a Presbyterian church. CONG. GLOBE, 39th Cong., 1st Sess. 2676, 2677, 3970 (1866). When the bill came to the Senate, Senator Johnson noted that if section 34 were repealed ". . . there will be no limit here within the District, and they may hold any amount of real property." CONG. GLOBE, 39th Cong., 1st Sess. 2912 (1866). While Senator Willey saw no need for an interdiction upon the amount of property real or personal which a religious association could hold, Senators Davis, Johnson and Buckalew did. CONG. GLOBE, 39th Cong., 1st Sess. 3970 (1866). The question was then whether the limitation should be on the amount of the gift, as proposed by Senator Davis, or on the timing of the gift, as suggested by Senator Buckalew and introduced by Senator Johnson. CONG. GLOBE, 39th Cong. 1st Sess. 3970-3971 (1866). Senator Davis referred to the size restriction on gifts in his state as being applicable to any religious association or organization of any kind. He alluded to the supposed fact that in Mexico half the lands of the country were held by the church.[6] CONG.

[6] Cf. "In times of popery, said Lord Hardwicke, the clergy got nearly half the real property of the kingdom into their hands, and he wondered they had not got the whole," 4 Kents Com. 494 (1830).

GLOBE, 39th Cong., 1st Sess. 3971 (1866). Senator Johnson thought this was not to be feared in the United States because,

> "It is impossible with our institutions we can be in any danger from religious establishments: first, because there is no State religion; secondly, because there are so many different sects, each one of whom watches the others just as vigilantly as England would watch the dispositions of France. I do not see, therefore, that there is any great danger to result from leaving parties here to leave as much property to charities as they please." CONG. GLOBE, 39th Cong., 1st Sess. 3971 (1866).

Senator Buckalew, in speaking of the Pennsylvania [7] experience concerning the reasons for the time limitation on a bequest, stated:

> "Persons in the last hours of an expiring existence are subjected to influence of a very unusual character, and are subjected to them at a time when they are little able to exercise the full and mature powers of their minds." CONG. GLOBE, 39th Cong., 1st Sess. 3970 (1866).

Senator Johnson agreed with Senator Buckalew, remarking:

[7] The Pennsylvania statute to which the senator referred was adopted in 1855 and quoted in *Jones* v. *Habersham*, 107 U.S. 174, 78, 2 S.Ct. 336, 340 (1883). Its successor was found violative of the Constitution's equal protection clause by the Supreme Court of Pennsylvania in *In Re: Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (Pa. 1974) and *In Re: Estate of Riley*, 459 Pa. 428, 329 A.2d 511 (Pa. 1974) *cert. denied*, 421 U.S. 971, 95 S.Ct. 1966 (1975) with statement "The petition for a writ of certiorari is denied it appearing that the judgment below rests upon adequate state grounds." *See* case notes in 80 Dick.L.Rev. 152; 54 N.C.L.Rev. 341 and 37 U.Pitt.L.Rev. 169.

> "I very readily recognize the force of the observations made by my friend from Pennsylvania [Mr. Buckalew] It is very desirable that devises and gifts to objects of that description should be executed some reasonable time antecedent to the death of the donor or testator." CONG. GLOBE, 39th Cong., 1st Sess. 3970-3971 (1866).

From the foregoing it can be seen that Congress was concerned neither with the amount of property which might eventually be held by the church nor with the potential plight of the disinherited children [8] but rather was desirous of protecting a testator from overreaching by the clergy at a time when the testator was presumably least able to evaluate objectively a promise of salvation.

In the general revision of District of Columbia statutes in 1901 Congress removed the proscription of the Mortmain statute on intervivos gifts, 31 Stat. 1434 (1901), and in 1965 added the proscription of bequests and devises to a priest and rabbi for the purpose of clarification and completeness, also changing the phrase "calendar month" to "30 days." 79 Stat. 688 (1965).[9]

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[8] As noted by the Court below, the provisions of the District of Columbia Mortmain statute "operate regardless of whether the Testator has any family at all. In the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia." (Jurisdictional Statement, Appendix A, 8a.)

[9] The change from "calendar month" to "30 days" was based on West's Ann. California Probate Code § 41. The revision note is contained in 10 D.C. Code Encyclopedia 52. The California statute, however, was repealed. Stats. 1971 c. 1395 p. 4747, § 1.

C

THE ENGLISH BACKGROUND OF MORTMAIN

The Pennsylvania statute of 1855, Pa. Act April 26, 1855 P.L. 328 No. 347 (which applied to charitable rather than only religious transfers) after which the Congress modeled the 1866 proviso to its repeal of the 34th section of the Maryland Declaration of Rights, is based upon the Mortmain Act of 1736, 9 Geo. II c.36 [10] by which all charitable devises of land, or personalty to be laid out in the purchase of land, are rendered void unless made at least 12 calendar months before the death of the donor by a writing signed in the presence of two witnesses. Blackstone states that the statute was adopted because it was experienced

> ". . . that persons on their death-beds might make large and improvident dispositions even for these good purposes [charity] and defeat the political ends of the statutes of mortmain . . ." 2 Bl. Comm. 273.

The legislative history and interpretation of the 1736 act indicates that it was not patterned after the original Mortmain provision, *Magna Carta* c.36 (1217 and 1225) despite its reliance thereon. The traditional statutes (*Magna Carta*, De Viris Religiosis, 7 Edw. I, stat. 2, c.3 [1279], 15 Richard II c.5 [1391-2] and 23 Henry VIII c.10 [1531-2])

> ". . . though enacted to meet the evil of land falling into the dead hand, were designed to protect the

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[10] This statute was never applicable in the United States except in Pennsylvania and hence is not a part of American common law. 2 Kents. Comm. 282 (1830); *Perin* v. *Carey*, 24 How. 465, 507, 16 L.Ed. 701, 712 (1861); Remick "Restrictions on Gifts For Religious or Charitable Uses," 51 Dick. L.Rev. 201 (1947).

feudal rights of mesne lords rather than to nurture the selfish aspirations of the heirs-at-law." Gareth Jones, *History of The Law of Charity 1532-1827,* 112 (1969), *see also Fleta* III c.5 (89 Selden Society 9 [1972]); "Restrictions on Charitable Testamentary Gifts" 5 Real Property Probate & Trust J. 290 (1970).

The 1736 statute, in contrast, vested the devised real estate in the testator's heirs.

> "This statute was inspired by a fear and hatred of the Church and ecclesiastical charities, by a contempt for the 'vainglorious' ambitions of charitably minded testators and by a desire to ensure that the heir-at-law should enjoy 'some sort of natural right to succeed after his [ancestor's] death, at least to his [ancestor's] land-estate." Jones, *supra* 107, relying on William Cobbett *Parliamentary History of England,* IX, 1126 (1811).

The 1736 statute, nevertheless, did not single out religion, but applied to all charitable devises. In this regard the 1736 statute was not at odds with an ancient restriction on deathbed transfers of real estate to anyone. For example, Glanvill states:

> "Now, although the general rule is that any person is allowed to give freely in his lifetime a reasonable part of his land to whom he pleases, this liberty has not hitherto been extended to those about to die, because there might be an extravagant distribution of the inheritance if it were permitted to one who loses both memory and reason in the turmoil of his present suffering, a common enough happening. Therefore if anyone mortally sick began to distribute his land, which he had not in the least wished to do while he was well, this would be presumed to result rather from turmoil of the spirit than from deliberation of the mind. However, a gift of this kind made to another in a last will can hold good if made and confirmed with the heir's consent." Glanvill, *Tractatus de Legibus,* VII, 1 (Hall ed. 70 [1965]).

It should be noted, additionally, that the 1736 statute did not apply to bequests of pure personalty, because testaments of personal property (in the absence of spouse and children) had always been freely disposable; even where legitim applied to protect a spouse and children the testator was free to dispose of ⅓ of his estate, *see* Glanvill, *Tractatus de Legibus,* VII, 5 (Hall ed. 80 [1965]); recognized in *Magna Carta* c.26 (1215) and c.18 (1225) "And if he owes us nothing, all the chattels shall be accounted as the deceased's saving their reasonable shares to his wife and children;" stated in Bracton, *De Legibus Et Consuetudinibus Angliae,* F 61 (Thorne ed. II, 180 [1968]), "If he dies without wife or children, then the whole will remain at the deceased's disposal;" *accord Fleta,* II, c.57 (72 Selden Society 193 [1953]).

The original Mortmain prohibition applied to real estate to prevent the loss of feudal incidents. During the reformation Mortmain statutes were used to void the concept of the superstitious use "so-called because it was a use which supported false (superstitious) religious purposes" as distinguished from legitimate charitable uses, Jones, *supra* p. 11. In Georgian times Mortmain became the basis of voiding all charitable transfers of land made within a year of death. The prohibition thus evolved from disabling the grantee from receiving real estate to invalidating the grant of a short lived grantor. It was not until the time of the reformation and actually the Hanovarians that attention focused on the nature of the devise rather than on the

status of the devisee. At no time other than the reformation was there a conscious effort to single religious gifts out for treatment different than that afforded charities generally. During all this time no such restrictions applied to legacies of personalty. Appellee acknowledges that while this Court may not have heretofore seen a constitutional distinction between realty and personalty, *United States* v. *Burnison,* 339 U.S. 87, 93, 70 S.Ct. 503, 507 (1950), there is a decided historical and legal difference as above described which should be considered in evaluating the reasonableness of D.C. Code § 18-302, since constitutionality ". . . depends upon the character of the discrimination and its relation to legitimate legislative aims." *Mathews* v. *Lucas,* 427 U.S. 495, 504, 96 S.Ct. 2755, 2761 (1976).

Appellee submits that the foregoing analysis of the history of the District of Columbia Mortmain statute supports the assertion that the statute is unique in its restriction on religious bequests and devises, and that its purpose is to reach only those bequests and devises made to religious organizations for religious purposes. When the Congress adopted the proviso to its repeal of the 34th section of the Maryland Declaration of Rights, in an attempt to provide the District of Columbia with a "deathbed gifts" Mortmain statute, the Congress fully intended to restrict only religious gifts. By neglecting to include charitable gifts as well, the Congress adopted a unique statute which was not in conformity with the very precedent pursuant to which the Congress purported to act. For the reasons to be developed in this Brief Appellee submits this action by Congress is constitutionally infirm.

III

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE IRRATIONALLY DISCRIMINATES AGAINST RELIGIOUS BEQUESTS AND DEVISES

A

APPELLANTS HAVE FAILED TO SHOW ERROR

The Court below (Jurisdiction Statement, Appendix A, 7a, 8a) found that D.C. Code § 18-302

> ". . . voids only religious devises or bequests and distinguishes further between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions making only the latter valid. There is no rational basis for presuming that a testator troubled by religious considerations is likely to make a bequest directly to a church, rather than to a charity run by the church. Thus, the statute arbitrarily provides different treatment for similarly situated legatees."

Appellants' quarrel with the decision below is not that the court used the wrong equal protection formula [11] but that the court reached the wrong result. Appellants argue that the classification is rational because the influence of the church is greater (Appel-

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[11] The Court below used the "rational basis" test relying upon *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400 (1972); *Reed* v. *Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971); *Stanton* v. *Stanton,* 421 U.S. 7, 95 S.Ct. 1373 (1975) and *Eisenstadt* v. *Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972). While equal protection under the Fourteenth Amendment is not applicable because the District of Columbia is not a state (*District of Columbia* v. *Carter,* 409 U.S. 418, 93 S.Ct. 602 [1973]), "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" stated the District of Columbia Court of Appeals, citing *Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976) (Jurisdictional Statement, Appendix A, 6a).

lant's Brief, p. 11). Appellants, however, ignore the central holding of the court below that the discrimination is not between religious gifts and non-religious gifts but between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions (Jurisdictional Statement, Appendix A, 8a). Appellants therefore, by failing to address the actual holding of the Court below, have failed to demonstrate error.

B

THE CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION ARE APPLICABLE TO LAWS REGULATING TRANSMISSION OF PROPERTY AT DEATH

Appellants appear to suggest in their Brief, page 9, that constitutional requirements of equal protection are not applicable to laws regulating the transmission of property at death. Appellee submits that this novel proposition is incorrect.

Appellee nevertheless does not question here the proposition that governmental control over disposition of property at death through regulation of both testate and intestate succession is a proper function of government. Cf. *United States* v. *Burnison,* 339 U.S. 87, 70 S.Ct. 503 (1950); *Labine* v. *Vincent,* 401 U.S. 532, 91 S.Ct. 1017 (1971). Appellee, further, does not assert either a constitutional right on the part of the testatrix to execute a will or on its part to be a legatee thereunder, *Burnison, supra.* Although there is good reason [12] and historical authority [13] for that proposi-

[12] *E.g., Nunnemacher* v. *State,* 129 Wisc. 190, 108 N.W. 627, 9 L.R.A. (N.S.) 121 (1906).

[13] *E.g., Magna Carta,* c.26 (1215) and c.18 (1225); Pollock & Maitland, *History of English Law* II, 348 (1898); Holdsworth, *A History of English Law 4th ed.,* III, 550 (1942).

tion, such is not at issue in this case. However, the courts have recognized that when the government becomes involved with carrying out a will (*Evans* v. *Newton,* 382 U.S. 296, 86 S.Ct. 486 [1966]), selecting a fiduciary (*Reed* v. *Reed,* 404 U.S. 71, 92 S.Ct. 251 [1971]), or making dispositive choices upon intestacy (*Eskra* v. *Morton,* 524 F.2d 9 [7th Cir. 1975]) that its choices "are not immunized from equal protection scrutiny." *Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459, 1464 n.12 (1977). While for reasons which are advanced *infra,* Appellee believes there is a fundamental interest, namely religion, involved in this case so as to render the compelling governmental interest standard for equal protection review applicable, there is without cavil a right to be free of invidious discrimination founded upon no reasonable basis, *Weinberger* v. *Salfi,* 422 U.S. 749, 95 S.Ct. 2457 (1975). This right applies equally to both the testator and the beneficiary, although in the context of this case Appellee does not think it is either useful or necessary to break down the transaction into separate inquiries pertaining to each of the parties, as was done in *United States* v. *Burnison,* 339 U.S. 87, 70 S.Ct. 503 (1950) (power to will vs. power to receive) or *Califano* v. *Goldfarb,* —— U.S. ——, 97 S.Ct. 1021 (1977) (discrimination against wage-earner or survivor).

Appellee also does not dispute in this case the proposition that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction" as set forth in *Irving Trust Co.* v. *Day,* 314 U.S. 556, 62 S.Ct. 398 (1942) although that proposition was based upon poor historical analysis since it ignored the 700 year-old

right of a testator to bequeath at least one-third of his property to whomever he chooses, as was recognized in *Magna Carta* c.26 (1215) and c.18 (1225). Nevetheless, when the government makes a benefit available it must do so consistently with the requirements of equal protection.

Thus, Appellee does not argue that the imposition of a period of survivorship after execution of a will is an unconstitutional condition for the validity of a will [14] but rather that D.C. Code § 18-302 imposes such a condition discriminatorily. It would be one matter to impose the condition of the testator's survivorship for thirty days for the validity of all bequests and devises as inferentially suggested by Glanvill, VII, 1, *supra*. Arguably, such a condition might be imposed upon bequests and devises to charity generally, and although that proposition is not free of doubt,[15] it at least has a

[14] Appellants argue that D.C. Code § 18-302 "is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid" (Appellants' Brief, p. 9). Contrary to Appellants' contention, D.C. Code § 18-302 is not merely a statute governing the formal requirements for a testament. It cannot be because historically there were no formal statutory requirements for testaments of personal property in the District of Columbia until 1901. See 31 Stat. 1433 ch. 59 (1901). Before 1901 testaments of personal property were not required to be in writing or witnessed, whereas wills of real property have had to be in writing (since 32 Henry VIII c. 1 [1540]) and witnessed by attesting witnesses (since 29 Car. II c. 3 xii [1677]), a legacy to whom was void (since 25 Geo. II, ch. 6, sec. 1-7 [1752]). Thus, neither D.C. Code § 18-302 nor the Mortmain Act of 1736, 9 Geo. II c. 36, added any formalities to the requirements for the execution of testaments.

[15] Thirty day donor survivorship for charitable gifts denies charities equal protection, *In Re: Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (Pa. 1974); *In Re: Estate of Riley*, 459 Pa. 428, 329 A.2d 511 (Pa. 1974) *cert. denied*, 421 U.S. 971, 95 S.Ct. 1966 (1975) *contra*,

validity being historically consistent with the Mortmain Act of 1736. 9 Geo. II c.36. Appellee submits, however, that if the condition of survivorship is imposed only when the bequest or devise is to a religious organization for religious purposes, an invalid act of discriminatory classification results.

In view of the operation of D.C. Code § 18-302 which voids gifts which fall within its proscription (*Long* v. *Gloyd*, 25 Wash.L.Rptr. 50 [S.Ct. 1897], gift is void not voidable), there is no question that the government is involved in the disposition of a decedent's property when such a bequest is voided, because the law then determines who is to receive the property.[16] Appellants' assumption, unsupported by federal authority, that equal protection does not apply to the issues in this case is accordingly without merit.

C

THE CLASSIFICATION CREATED BY D.C. CODE § 18-302 IS BASED ON CRITERIA WHICH BEAR NO RATIONAL RELATION TO A LEGITIMATE LEGISLATIVE GOAL

As seen above, the District of Columbia Mortmain statute, D.C. Code § 18-302, is unique both from the point of view of history and contemporary American

Taylor v. *Payne*, 154 Fla. 359, 17 So.2d 615, *appeal dismissed*, 323 U.S. 666, 65 S.Ct. 49 (1944); *Decker* v. *American Univ.*, 236 Iowa 895, 20 N.W.2d 466 (1945).

[16] Under District of Columbia law when part of a gift of the residue, as is the bequest to Appellee, fails (lapses) the property passes as intestate property. *In Re: Estate of Prentice*, 104 Daily Wash.L.Rptr. 1525 (Adm. No. 945-75, S.Ct. July 21, 1976). As the Court said in *Trimble* v. *Gordon*, —— U.S. ——, 97 S.Ct. 1459 (1977) note 16 at p. 1467, "The term "statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not individuals. Under the Fourteenth Amendment this is a fundamental difference."

law in that it treats gifts to religious institutions for religious purposes differently from all other testamentary gifts. Appellee submits that the statute is irrational and bears no reasonable relation to a legitimate governmental goal, because there is no reasonable basis for the discrimination imposed by D.C. Code § 18-302.

1

The Classification Of The Statute Which Voids Some But Not All Testamentary Gifts To Religious Organizations Is Not Reasonably Related To The Legislative Goal Of Protecting The Testator From Undue Religious Influence

The District of Columbia Court of Appeals found that

> "The purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations." (Jurisdictional Statement, Appendix A, 3a.)

The court relied upon the legislative history cited above. The court was careful, however, to distinguish the history and purpose of the District of Columbia Mortmain statute from that of the usual Mortmain statute. Thus, the court did not find that the District's Mortmain statute was designed to protect the testator's family because such an expression is not contained in the legislative history, although it noted that

> "Mortmain statutes in general are intended to protect a donor's family from disinheritance due to charitable gifts made either without proper deliberation or as a result of undue influence on the part of the beneficiaries." (Jurisdictional Statement, Appendix A, 3a, 4a.)

Appellants, choosing to ignore the legislative history of the statute, cite at page 9 of their Brief the protection of the testator's lawful heirs as a purpose of the District of Columbia Mortmain statute. The case from which Appellants' source is derived, *In Re: Nutting's Estate,* 82 F.Supp. 689 (D.D.C. 1949) *aff'd sub nom., Linkins* v. *Protestant Episcopal Cathedral Foundation of The District of Columbia,* 87 U.S. App.D.C. 351, 187 F.2d 357 (1950) does not state the purpose of the District of Columbia statute; rather the court notes, at page 690, that the statute

> ". . . is similar in purport to statutes in many states. It is generally held that such statutes are to be strictly construed. The purpose of such statutes has been variously stated; to prevent improvident testamentary gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or as sometimes stated, it is intended to prevent a testator, under the fears incident to death, from disposing of his estate to the prejudice of his descendants."

In any event, as noted by the Court below, D.C. Code § 18-302 operates without regard to whether the testator has heirs or not and "in the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia." (Jurisdictional Statement, Appendix A, 8a.) It should also be noted that were the purpose of D.C. Code § 18-302 to protect the heirs, that the heirs are not permitted by the statute to waive that protection in favor of the religious legatee, a provision suggested by Glanvill in *Tractatus de Legibus,* VII, 1, quoted *supra,* and often contained in Mortmain statutes, *see Taylor* v. *Payne,* 154 Fla. 359, 17 So.2d 615, *appeal dismissed,* 232 U.S. 666, 65 S.Ct. 49 (1944).

The family of a decedent is specifically protected by D.C. Code § 19-101 which both defines the family and provides for an allowance. Collateral heirs at law and next of kin such as Appellants are not included within D.C. Code § 19-101, nor are they protected by six out of seven jurisdictions with Mortmain statutes.[17] We think D.C. Code § 18-302 can hardly be said to mirror any presumed intent of the testator to benefit statutory heirs at law and next of kind as substituted beneficiaries in the event of interdiction of a bequest, because such was not found to be a statutory purpose by the District of Columbia Court of Appeals. *See Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459 (1977).

Thus, D.C. Code § 18-302 was not enacted by Congress to protect a decedent's family. Those other Mortmain statutes which were adopted to protect the family do not operate for the benefit of collateral heirs at law and next of kin, such as Appellants. *See Jones* v. *Habersham,* 107 U.S. 174, 2 S.Ct. 336 (1883) (Georgia Code does not invalidate charitable devise contained in will executed within 90 days of death in absence of spouse, child or descendant of child). D.C. Code § 18-302 operates without regard to whether the testator is survived by any kin whatsoever. The statute, therefore,

[17] The statutes of Florida, Georgia, Idaho, Iowa, Mississippi, Ohio and New York protect a combination of spouse, child or descendants. The Montana statute like D.C. Code § 18-302 applies regardless of who survives the testator. Fla. Stat. Ann. § 731.19 (1964); Ga. Code Ann. § 113-107 (1935); Idaho Code § 15-2-615 (Supp. 1972); Iowa Code Ann. § 633.266 (1964); Miss. Code Ann. § 91-5-31 (1972); Mont. Rev. Codes Ann. § 91-142 (1947); N.Y. Est., Powers & Trusts § 5-3.3 (McKinney 1967); Ohio Rev. Code Ann. § 2107.06 (Page 1954). None of these statutes, however, is restricted to only religious bequests and devises. For a general discussion of the statutes, see "Restrictions On Charitable Testamentary Gifts," 5 Real Property, Probate & Trust J. 290 (1970).

is not related to the achievement of protection for the heirs at law and next of kin, even if it could be said that was the purpose of the statute.

By the statute's entire failure to include charitable bequests, even charitable bequests to religious organizations, so that the heirs at law and next of kin may be "disinherited" by a gift to charity, the statutory classification bears no rational relationship to a legitimate governmental purpose, that of protecting the family, assuming that was the legitimate purpose. Neither does the statute bear any reasonable relation to the goal of protecting a testator from undue religious influence, assuming such could be a legitimate legislative purpose, since D.C. Code § 18-302 does not reach charitable gifts to religious organizations. The statute, thus, is not carefully tuned to alternative considerations as required by equal protection, *see Matthews* v. *Lucas,* 427 U.S. 495, 96 S.Ct. 2755 (1976) and *Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459 (1977), *see also,* Remick, "Restrictions on Gifts For Religious or Charitable Uses," 51 Dick.L.Rev. 201 (1947).

2

The Classification Was Not Created For A Legitimate Legislative Goal

The express Congressional purpose for D.C. Code § 18-302 as found by the court below (Jurisdictional Statement, Appendix A, 3a) "is to preclude 'deathbed' gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations." Appellants rely upon the argument that because the influence of the clergy is greater, it is rea-

sonable for the government to act "to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation" (Appellant's Brief, p. 13). Appellee submits that the legislative goal of D.C. Code § 18-302 is not legitimate, since it is an attempt, by including only religious gifts to religious organizations, to deprive the clergy and religious organizations of the privilege of receiving bequests that anyone else may receive. In *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 93 S.Ct. 2821 (1973), a case involving the question of whether food stamp rules were discriminatory, the Court found that the legislative history indicated a Congressional purpose to prevent "hippies" from receiving food stamps. The Court stated at page 534/2826

> "The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politcally unpopular group cannot constitute a *legitimate* governmental interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.' 345 F.Supp. at 314 n. 11."

Even without a reference to the First Amendment free exercise clause as a guarantee of the right of the clergy and religious organizations to solicit gifts, which is discussed *infra,* it would seem in light of the history of Mortmain, a Congressional singling out of religious persons and organizations for discriminatory treatment cannot constitute a legitimate legislative goal." Since both the Pennsylvania statute (from which D.C. Code § 18-302, was taken), the English statute (from which the Pennsylvania statute was taken), as well as the other remaining American Mortmain statutes include charities generally within their proscription and not just religion, what legitimate legislative purpose did Congress have in adopting D.C. Code § 18-302 by which religion alone is subjected to discriminatory treatment? Since the arguable legitimate goal of all the Mortmain statutes is to protect the family from disinheritance why did Congress offer that protection only for disinheritance through religious bequest without even regard to whether the testator is survived by a family or heirs at-law and next of kin?

Appellee submits that the decision of the District of Columbia Court of Appeals was correct that D.C. Code § 18-302 creates a discriminatory classification for which there is no reasonable or rational basis and therefore the decision should be affirmed.

---

[18] Appellee also sugegsts that the establishment clause mandates this conclusion, *see Everson* v. *Board of Education of Ewing Tp.* 330 U.S. 1, 18, 67 S.Ct. 504, 513 (1947) "State power is no more to be used so as to handicap religions, than it is to favor them;" *School District of Abington Tp. Pa.* v. *Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571 (1963) "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson* v. *Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270 (1968) Government ". . . may not be hostile to any religion. . . ."

IV

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE UNCONSTITUTIONALLY AFFECTS A FUNDAMENTAL INTEREST BY ITS CLASSIFICATION OF TESTAMENTARY RELIGIOUS GIFTS TO RELIGIOUS ORGANIZATIONS FOR WHICH NO COMPELLING INTEREST HAS BEEN SHOWN

A

AS THE STATUTE AFFECTS RELIGIOUS GIFTS IT AFFECTS A FUNDAMENTAL INTEREST

The District of Columbia Court of Appeals determined

> ". . . that the discriminatory treatment cannot stand even under the rational basis test,

thus, it decided,

> "it is unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest,"

even though,

> "The trial court determined that there is neither a compelling state interest nor rational grounds justifying the statutory classification." (Jurisdictional Statement, Appendix A, 9a)

Appellants have asserted that since the District of Columbia Mortmain statute has a secular purpose and deals with a secular activity it cannot be found to regulate a fundamental interest (Appellants' Brief pp. 7, 10). Appellants also argue that the statute does not affect a suspect class (Appellants' Brief, p. 12). The trial court, however, in an opinion by Judge Newman

(now Chief Judge of the District of Columbia Court of Appeals), determined that the District of Columbia Mortmain statute affects only religious bequests, and religious interests "have traditionally been regarded as in a preferred position under our Constitution." The trial court then concluded that "The regulation of such conduct or actions, however, can only be justified by a showing of a compelling state interest." (Jurisdictional Statement, Appendix B, 6b, 7b).

1

A Statute Which Interdicts Only Testamentary Religious Gifts To Religious Organizations Is Not Legislation Having A Secular Purpose And Dealing With A Secular Activity

As noted above, the District of Columbia Mortmain statute only affects testamentary religious gifts to religious organizations. It does not void charitable gifts to organizations owned and operated by religious institutions. Appellants, by focusing their analysis on the testamentary disposition of property, which they call a secular activity, fail to perceive that the restriction on only religious gifts, on the grounds that only the clergy have such a beguiling power to effect bequests and devises due to their patent on the salvation of the soul (Appellants' Brief, pp. 7, 11), injects religion into what might otherwise be a secular activity.[19] A statutory purpose to invalidate a gift to religion on the presumed grounds that it has been solicited by the clergy until the testator has had a "cooling off" period can

[19] In view of the early history of wills, the language of wills, the religious horror of intestacy and the role of the church and its courts in enforcing wills, Appellants' characterization of a bequest or devise to a church as a secular act can only be characterized as historically curious. See Pollock and Maitland, *History of English Law*, II 314-363 (1898).

hardly be found to be secular. If the statute was directed to only a secular activity for a secular purpose, it would not single out religion; it would deal with all bequests and devises to all charitable institutions as indeed the original modern Mortmain statute did 9 Geo. II c.36 (1736). Because the District of Columbia Mortmain statute singles out religion on the tenuous ground that the church has more sway with the soon-to-die, the statute reflects the legislative stereotype assumption that a testator is more likely to be moved by the persuasion of the church, in other words, to act on the basis of religious appeal.

2

A Statute Which Classifies An Activity Because Undertaken For Religious Reason Affects A Fundamental Interest

The trial court had no difficulty understanding that because the District of Columbia Mortmain statute classifies religious bequests and devises and differently, it affects a fundamental interest (Jurisdictional Statement, Appendix B, 6b), because it is a regulation of acts prompted or undertaken on account of religious consideration. *Sherbert* v. *Verner,* 374 U.S. 398, 83 S. Ct. 1790 (1963). It should be noted that the District of Columbia Mortmain statute is entirely different from the Sunday closing laws, the specious analogy to which is so heavily relied upon by Appellants (Appellants' Brief, p. 7). As has been shown, the Mortmain statute applies only to religious bequests and devises whereas the Sunday closing laws applied either to all business or classified business on the basis of goods sold. *Braunfeld* v. *Brown,* 366 U.S. 599, 81 S.Ct. 1144 (1961). A statute which does not single out religion may well have a secular purpose and be justifiable even if a burden is

imposed thereby on religion ". . . unless the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld* v. *Brown, supra,* p. 607/1148.[20]

B

THERE IS NO COMPELLING GOVERNMENTAL NEED FOR THE DISTRICT OF COLUMBIA MORTMAIN STATUTE

Since the District of Columbia Mortmain statute affects a fundamental interest it may survive equal protection analysis only if Appellants can show a compelling governmental need for it. *Sherbert* v. *Verner, supra.* Appellants failed to make that showing in the trial court, in the District of Columbia Court of Appeals, and have failed so to do in their Brief before this Court.

The trial court found there was no compelling interest "since alternative less restrictive methods of preventing abuse are available." (Jurisdictional Statement, Appendix B, 7b.) The trial court further stated "there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period" (Jurisdictional Statement, Appendix B, 7b).[21]

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[20] The Florida Mortmain statute applied to all charities. Presumably this was the basis for this Court's dismissal of the appeal for want of a substantial federal question in *Taylor* v. *Payne,* 154 Fla. 359, 17 So.2d 615, *appeal dismissed,* 323 U.S. 666, 65 S.Ct. 49 (1944).

[21] In Appellee's view such a presumption would still be treating religion differently but it would have the merit of at least avoiding a total forfeiture. The legacies in this case would have been valid under such a rule inasmuch as it was stipulated that none knew of any undue influence (A. 14). The District of Columbia Court of

Thus, Appellee submits that those reasons advanced above as to the irrationality of the District of Columbia Mortmain statute apply equally to show why there is no compelling governmental need for the statute. Additionally, Appellee submits that there is no legitimate need for government regulation of testamentary religious gifts since the existing remedy for invalidating bequests or devises secured through undue influence is sufficient.[22]

Appellee, therefore, submits that the decision of the District of Columbia Court of Appeals may be found correct on the alternative ground that D.C. Code § 18-302, by singling out religious bequests and devises for discriminatory treatment, affects a fundamental interest in religion, for which there is no compelling governmental need in view of both the long standing freedom of testamentary disposition of personal property and the less restrictive means available for preventing undue influence in the execution of wills.

Appeals noted that D.C. Code § 18-302 "Establishes an irrebuttable presumption that certain bequests to clergymen or religious organizations are the result of undue influence" and because many others who are in an equal position to influence a testator do not suffer forfeiture of their legacies, the statute is irrational because "There is no ground of difference that rationally explains the different treatment accorded religious entities." (Jurisdictional Statement, Appendix A., 8a.) Appellee agrees with this analysis, however, Appellee believes that because there is a fundamental interest in religion involved in this case that even a rebuttable presumption or imposition of a burden of proof upon religion would be impermissible, cf. *Frontiero* v. *Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). Appellee also agrees with the Court's statement of its function in reviewing a "presumption" case, "Nor, in ratifying these statutory classifications, is our role to hypothesize independently on the desirability or feasibility of any possible alternative basis for presumption." *Mathews* v. *Lucas,* 427 U.S. 506, 96 S.Ct. 2755, 2767 (1976).

[22] For a discussion of the existing remedy, see Mersch, *Probate Court Practice In The District of Columbia* (2nd ed.) § 741 *et seq.* (1939).

V

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE UNCONSTITUTIONALLY RESTRAINS THE FREE EXERCISE OF RELIGION

While the District of Columbia Court of Appeals did not invalidate the District of Columbia Mortmain statute on First Amendment grounds, a concurring opinion thought that court should have done so. (Jurisdictional Statement, Appendix A, 9a-11a.) The trial court, however, did base its holding of unconstitutionality in part on the First Amendment. (Jurisdictional Statement, Appendix B, 6b.)

Appellants assert that the operation of the District of Columbia Mortmain statute which invalidates only testamentary religious gifts does not restrain the free exercise of religion. Appellants also question whether Appellee is entitled to the free exercise of religion. Appellee submits both these points are groundless.

A

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE RESTRAINS THE FREE EXERCISE OF RELIGION

As Appellee has shown *supra,* the District of Columbia Mortmain statute applies only to testamentary gifts to religious institutions. The statute discriminates against religious gifts because presumably they have been procured through religious zeal, as opposed to non-religious ordinary undue influence.

Appellee concedes that as to matters of conduct the First Amendment does not impose an absolute bar to

statutory regulation when "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert* v. *Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 1793 (1963). Appellee submits, however, that when only those actions presumably inspired by religion are regulated that religion itself is regulated. This statute singles out religion; "Clearly the statute discriminates against religion." *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L.Rptr. 453 (Adm. No. 2507-70 D.D.C. 1972).

B

APPELLEE IS ENTITLED TO THE FREE EXERCISE OF RELIGION

Appellants have shockingly suggested that Appellee is not entitled to the free exercise of religion. (Appellants' Brief p. 8.) Appellee submits that it most certainly is entitled to the free exercise of religion which the District of Columbia Mortmain statute has restrained.

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church In North America,* 344 U.S. 94, 116, 73 S.Ct. 143, 154-155 (1952) the free exercise of religion as a right was afforded to the church, although in circumstances quite different from this case. That case relied in part upon *Watson* v. *Jones,* 13 Wall. 679, 20 L.Ed 666 (1872) wherein the Court noted at page 723/674:

> "... it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, providing that in doing so they violate no law of morality,

> and give to the instrument by which their purpose is evidenced, the formalities which the laws require."

Thus, free exercise contemplates the acquisition of property. This right has inferentially been recognized by the Court, which remarked in *Jones* v. *City of Opelika*, 316 U.S. 584, 62 S.Ct. 1231 (1942), at page 596/1239,

> "Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge."

The Court has also noted in *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870 (1943) at page 111/874,

> "It is plain that a religious organization needs funds to remain a going concern."

Were the District of Columbia to adopt a "cooling off" law permitting a donor to rescind a gift made to a door to door religious preacher, Appellee has no doubt this Court would not uphold it. Cf. *Schneider* v. *State of New Jersey,* 308 U.S. 147, 60 S.Ct. 146 (1939) (invalidity of handbilling regulation); *Jamison* v. *State of Texas,* 318 U.S. 413, 63 S.Ct. 669 (1943) (invalidity of handbilling regulation used to prevent religious solicitations);[23] *Busey* v. *District of Columbia,* 78 U.S. App.D.C. 189, 138 F.2d 592 (1943) (license fees may be invalid regulation of religious pedlers). Certainly the

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[23] The Court also stated "In *Cantwell* v. *Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352, we said that a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or *delaying their collection.*" (Emphasis supplied.) *Jamison, supra* p. 417/672.

District of Columbia Mortmain statute which is intended to regulate the solicitation of religious testamentary gifts by voiding delivery after death if the intent to give is expressed in a will executed within 30 days of death is no less invalid. Appellee submits that if a testator must survive 30 days in order for a testamentary gift to religion to be valid upon probate there is a "chilling effect" upon the testator's exercise of his freedom of religion. This Court has recently stated that a contribution to a political group is protected by the First Amendment as it stated in *Abood* v. *Detroit Board of Education,* ——U.S. ——, —— S.Ct. ——, 45 U.S. L.W. 4473, 4480 (No. 75-1153 May 23, 1977)

> "One of the principles underlying the Court's decision in *Buckley* v. *Valeo,* 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," *id.,* at 22, the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests," *id.,* at 23."

If a contribution to a political party (which is nowhere specifically mentioned in the Constitution) is protected by the First Amendment, certainly a testamentary religious gift to a religion (which is specifically given a preferred position by the Constitution) perforce must be protected.

Appellee submits that the decision of the District of Columbia Court of Appeals may be affirmed on the alternative ground advanced in the concurring opinion below that D.C. Code § 18-302 is an unconstitutional

infringement on the free exercise of religion. By voiding a testamentary gift to religion on the assumed grounds that the gift was procurred by undue religious influence, the statute restricts both the testator's free exercise right to make the bequest or devise and the clergy and a religious institution's free exercise right to solicit the same. Since D.C. Code § 18-302 is only directed toward testamentary religious gifts it places an unconstitutional burden on the free exercise of religion since there is a less restrictive remedy for any actually demonstrable undue influence.

CONCLUSION

Appellee, St. Matthews Cathedral, therefore, submits that this Court does not have appeal jurisdiction in this case and that as the issues do not present a substantial federal question this Court not review the case under certiorari jurisdiction. The Court should accordingly dismiss the appeal.

If the Court reviews the case either by appeal or certiorari, Appellee prays that the Court affirm the judgment of the District of Columbia Court of Appeals.

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APPENDIX

CONSTITUTIONAL AND STATUTORY APPENDIX

Constitution of the United States Article I, Section 8, Clause 17. The Congress shall have power

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And"

Article III, Section 1

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Amendment 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 1257, State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. As amended July 29, 1970, Pub.L. 91-358, Title I, § 172(a)(1), 84 Stat. 590."

D.C. Code § 18-302. Devises or bequests for religious purposes

"A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. (Sept. 14, 1965, 79 Stat. 688, Pub.L. 89-183, § 1, eff. Jan. 1, 1966.)"

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIBSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR APPELLEE CALVARY BAPTIST CHURCH

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*

Appellants,

v.

MICHAEL M. DOYLE, *et al.*

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLEE CALVARY BAPTIST CHURCH

PRIOR OPINIONS

The opinion and order of the Superior Court of the District of Columbia dated February 13, 1975, is unreported but appears in the Record (Juris. State. App. B, pp. 1b-9b).

The opinion of the District of Columbia Court of Appeals dated November 1, 1976, is reported at 365 A.2d 621, and appears in the Record (Juris. State. App. A, pp. 1a-11a).

JURISDICTION

Jurisdiction of this Court is alleged by the appellants to rest on 28 U.S.C. §1257(1).

Appellee Calvary Baptist Church on February 18, 1977, moved the Court to dismiss the appeal herein on the grounds that the Court has no jurisdiction over the appeal under 28 U.S.C. §1257(1) on the ground that §18-302 of the District of Columbia Code, the statute involved, is a local District of Columbia statute and not a "statute of the United States" as required by 28 U.S.C. §1257(1). The Court, on March 21, 1977, entered an order that "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Pursuant to Rule 16(6) of the Rules of this Court, appellee Calvary Baptist Church renews its motion to dismiss the appeal herein on the ground that the Court has no jurisdiction over the appeal under 28 U.S.C. §1257(1). As grounds for this motion, the Court's attention is respectfully directed to the argument set forth on pages 3-5 of the Motion to Dismiss or Affirm filed in this Court on February 18, 1977. As further reason for dismissal of this appeal, the Court's attention is called to the failure on the part of the appellants to comply with Rule 16(6), of the Rules of this Court which requires counsel to address themselves at the outset of their briefs to the question of jurisdiction when consideration of jurisdiction is postponed. Accordingly, appellants have failed to meet

the burden of showing that the jurisdiction by appeal was properly invoked. See: *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 236; *Raley v. Ohio* (1959), 360 U.S. 423, 435; *Slagle v. Ohio* (1961), 366 U.S. 259, 264.

STATUTE INVOLVED

Title 18 §302, District of Columbia Code

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator.

QUESTIONS PRESENTED

1. Is Title 18 §302 of the District of Columbia Code invalid as constituting an unconstitutional infringement of the free exercise of religion provisions of the First Amendment to the Constitution?

2. Is Title 18 §302 of the District of Columbia Code unconstitutional under the establishment clause of the First Amendment to the Constitution?

3. Whether the Courts below correctly held that Title 18 §302 of the District of Columbia Code is invalid as constituting a deprivation of due process of law guaranteed by the Fifth Amendment to the Constitution.

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate

to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Mrs. French had executed two previous wills in 1960 and 1963 in which she had made several religious bequests to both Baptist and Catholic organizations. There is no evidence that appellees had made any attempts to influence her choice of legatees. (Juris. State. App. A, p. 2a).

The Executor of the Estate of Sallye Lipscomb French instituted this action for instructions when the Finance Office of the District of Columbia refused to issue a tax certificate showing that the District of Columbia inheritance tax had been discharged. (App. pp. 5-10) The reason for the refusal of the Finance Office to issue the tax certificate was its contention that any distributuion to appellees Calvary Baptist Church and St. Matthew's Cathedral would be in violation of Title 18 §302 of the District of Columbia Code. Appellees answered the complaint and asserted the unconstitutionality of Title 18 §302 of the District of Columbia Code. The District of Columbia and the heirs-at-law, appellants herein, on the other hand, answered the complaint and asserted the validity of the statute and maintained that the residuary estate should be distributed intestate without regard to the residuary legacies bequeathed to the appellees. The parties filed cross motions for summary judgment based upon stipulated facts to which there was no genuine issue. (App. pp. 11-16) After a hearing on the motion for summary judgment, on February 13, 1975, the Superior Court of the District of Columbia granted the motion for summary judgment to Calvary Baptist Church and St. Matthew's Cathedral. (Juris. State. App. B, pp. 1b-9b). The District of Columbia did not appeal from the opinion and order of the Superior Court of the District of Columbia of February 13, 1975; only the appellants, heirs-at-law, appealed.

The District of Columbia Court of Appeals, after hearing, on November 1, 1976, affirmed the decision of the Superior Court of the District of Columbia and issued its opinion that Title 18 §302 was unconstitutional and violated the due process clause of the Fifth Amendment to the Constitution. (Juris. State. App. A, pp. 1a-11a)

On January 26, 1977, appellants filed notice of appeal to this Court from the judgment of the District of Columbia Court of Appeals of November 1, 1976. Appellants filed a jurisdictional statement in this Court on January 31, 1977; and appellee Calvary Baptist Church filed Motion to Dismiss or Affirm on February 18, 1977. On March 21, 1977, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits. (App. p. 2)

ARGUMENT

I

TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS INVALID AS CONSTITUTING AN UNCONSTITUTIONAL INFRINGEMENT OF THE FREE EXERCISE OF RELIGION PROVISIONS OF THE FIRST AMENDMENT TO THE CONSTITUION.

The free exercise clause of the First Amendment prohibits Congress from making any law interfering with the free exercise of religion. This prohibition protects religious organizations[1] as well as individuals and has been interpreted by this Court as denying to government any power to prescribe, regulate or favor, either directly or indirectly, any particular religious belief or doctrine.

Although the First Amendment is stated in language of absolute prohibition, the government, nevertheless, has inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner, in order to protect the safety, peace, and good order of all members of society, *Cantwell v. Connecticut* (1940), 310 U.S. 296; *Jamison v. Texas* (1943), 318 U.S. 413. However, the government may not by law or regulation infringe on the free exercise of religion unless there is a compelling public need. Where there exists a compelling public need, it may only be accomplished by not more than the least restriction necessary. First Amendment rights may

[1] The appellants question whether the exercise clause gives any "rights" to religions, at page 8 of their brief. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church* (1952), 344 U.S. 94, it was pointed out that the free exercise clause extends to religious organizations the same right to be free from governmental coercion as is extended to individuals.

not be infringed, as opposed to being merely regulated, simply because the legislature may have a "rational basis" for adopting such restriction, for freedom of worship may not be infringed on such slender grounds. *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624. In *Sherbert v. Verner* (1963) 374 U.S. 398, it was held that there must be some compelling state interest to justify any substantial infringement of a person's First Amendment rights. There the Court said:

> "* * *It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 US 516, 530 * * * "

Clearly, there is no compelling state need for the infringement provided for by Title 18 §302. This is illustrated by the fact that only seven other states have statutes designed to alleviate the purported evil of the "deathbed" influence, and none of these statutes discriminate solely against religion but rather restrict substantially all charitable bequests.[2] In addition, the other seven statutes are aimed at preserving the rights of descendants of the testator, the D.C. statute being the only one which can operate for the benefit of the state government (bequests invalidated by Title 18 §302 would escheat to the District of Columbia if the testator had no living heirs. See Title 19 §701, District of Columbia Code.) The

[2] *See* 41 Fla. Stat. Section 731.19; 113 Ga. Code Ann. Section 107; 14 Idaho Code Section 326; Iowa Code Section 633.266; Miss. Code Ann. Section 91-5-31; 91 Mont. Rev. Code Section 142; Ohio Code Ann. Section 2107.06. The Pennsylvania statute, 20 P.S. §180.7(1) was declared invalid in *In Re Estate of Cavill* (1974); 459 Pa. 428, 329 A.2d 503, and *In re Estate of Riley* (1974), 459 Pa. 428, 329 A.2d 511, cert. denied 421 U.S. 971, see discussion p. 17.

D.C. statute goes far beyond the least restriction necessary.[3] The appellants here have failed to demonstrate that no alternative forms of regulation would suffice to "protect" against the purported evil of deathbed bequests without infringing First Amendment rights. See *Sherbert v. Verner, supra; Shelton v. Tucker* (1960), 364 U.S. 479, 488.

This statute was declared invalid and unconstitutional on First Amendment grounds by Judge Gesell of the United States District Court for the District of Columbia in *In re Small*, 100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972), a copy of which is set forth in the Appendix to this Brief.

Title 18 §302 in requiring a testator to live at least 30 days from the date of executing a will as a condition to a valid bequest to a religious organization is an impermissible infringement of the free exercise clause of the First Amendment. Any restrictions on the free exercise of religion "have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner, supra.* In his concurring opinion in *Martin v. Struthers* (1943), 319 U.S. 141, 149, Mr. Justice Murphy stated:

> "I believe that nothing enjoys a higher state in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. * * *"

To deny the testator the right to give or bequeath and the appellee churches the right to receive the bequest in the circumstances of this case is to prohibit the free exercise of religion.

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[3] The Superior Court opinion suggests that there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period. (Juris. State. App. B, p. 7b) Cf. *Trimble v. Gordon*, _____ U.S. _____, 97 S.Ct. 1459 (decided April 26, 1977).

II

TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION.

The first clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion * * *." In *Walz v. Tax Commission* (1970), 397 U.S. 664, 669, the Court stated:

> " * * * the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. * * * "

In order to be valid under the Establishment Clause, a statute must meet the test set forth in the case of *Committee for Public Education v. Nyquist* (1973), 413 U.S. 756, 772-773. There it is stated that the three-part

test that has emerged from the Court's decision is that the law in question, first, must reflect a clear secular legislative purpose; second, must have a primary effect that neither advances or inhibits religion; and, third, must avoid excessive governmental entanglement with religion. Applying the foregoing principles and test to the statute in question condemns it is an unconstitutional infringement of religious freedom. It is fundamental that organized religion cannot function without the availability of donations and gifts from its supporters. Accordingly, anything that infringes on the right of religious organizations to receive or the right of the individual to give has a direct effect on religion's very existence. A statute which denies the bequest to the religious legatees in this case is direct governmental interference with religion. The protection afforded by the First Amendment includes the right of religion to financial support. *Cantwell v. Connecticut, supra; Jamison v. Texas, supra.* "It is plain that a religious organization needs funds to remain a going concern." *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 111. Donations and bequests are the lifeblood of organized religion, and any statute or law which alters or stops the flow of such gifts to religious organizations to any extent has the primary effect of inhibiting religion.

As found by the Court below, the purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations. See: Cong. Globe, 39th Congress, 1st Session, 3970-71 (1866) (Juris State. App. A, p. 3a) See *Abington School District v. Schempp* (1963), 374 U.S. 203, 222, where it is said:

> "* * *The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * * "

The legislative purpose of the statute here in question has the primary and principal effect of inhibiting religion. Consequently, the statute violates the Establishment Clause of the First Amendment to the Constitution. See: *Lemon v. Kurtzman* (1971), 403 U.S. 602.

The appellants argue (Br. p. 7) that the statute has a secular purpose and deals with a secular activity. First, assuming the secular purpose of the statute is to prohibit "deathbed" bequests to religious organizations, this does not help appellants. Where First Amendment rights are involved, in order to sustain the validity of the statute it is necessary to show some compelling state need for the enactment. *Sherbert v. Verner, supra.* Secondly, appellants' assertion that the statute deals with a secular activity overlooks the conflict between First Amendment rights and the right of the Congress to legislate regarding the right or privilege of a person to make a will. Where this conflict occurs, First Amendment rights are paramount and must prevail unless there is some compelling governmental interest that justifies the infringement of the First Amendment rights. As pointed out above, the purported evil of the "deathbed" influence is not a sufficient reason for the infringement of First Amendment rights.

The appellants argue (Br. p. 7) that the statute does not deny support to religious organizations and further that only a very limited group of gifts are eliminated. This argument overlooks the fact that the primary and

principal effect of the statute is to take away from religion *all* bequests made within the 30-day prohibited period. Further, when First Amendment rights are involved, it is the *nature* of the rights that are infringed and not the *degree*. Cf. *Board of Regents v. Roth* (1972), 408 U.S. 564, 570-571; *Goss v. Lopez* (1975), 419 U.S. 565, 575.

Appellants (Br. p. 7) argue that over 100 years of the statute have not resulted in the establishment or de-establishment (sic) of church or religion. In *Committee for Public Education v. Nyquist*, supra, the Court points out:

> "But historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use.' * * *" Id at 792.

Appellants rely on the decision in *Braunfeld v. Brown* (1961), 366 U.S. 599, which upheld a state Sunday closing law on the grounds that it had the secular purpose of setting aside a uniform day of rest for all citizens. This case is readily distinguishable from the instant case for the same reasons it was distinguished in *Sherbert v. Verner, supra*, i.e., "a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only be declaring Sunday to be that day of rest." In addition, in this case the discriminatory nature of the statute which singles out religious bequests for particular treatment makes it clear that the statute had other than a secular purpose.

Appellants (Br. p. 8) contend that the states possess extensive powers to establish rules of inheritance and that the Tenth Amendment reserves to the States the power to determine the manner of testamentary dispositions

[citing *Labine v. Vincent* (1971), 401 U.S. 532; and *United States v. Burnison* (1950), 339 U.S. 87]. Under this theory, a state could enact a statute making it illegal for persons of certain races to inherit property. Obviously, any powers reserved to the states under the Tenth Amendment are exercisable subject to paramount rights guaranteed to all citizens by the first nine Amendments. Appellants assert that "The disposition of property by will is governed solely by state statute."[4] However, having permitted legacies and devises generally, a state legislature may not thereafter restrict them in an unconstitutional manner. Cf. *Goss v. Lopez, supra*. In *Sherbert v. Verner, supra*, it was stated:

> " * * *It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. * * *" Id at 404.

Appellants conclude their argument against First Amendment rights (Br., p. 8) by pointing out that a spouse's renunciation of a bequest under Title 19 §113 could have a similar effect on bequests to religious organizations. This argument misses the point. A spouse's renuciation would affect all legatees alike, whether individuals, charitable, religious or otherwise. It does not single out religion for particular treatment.

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[4] This statement is subject to the holding of the Court in *Trimble v. Gordon, supra*, and particularly footnote 12 which in part states: "* * * Although the proposition is self-evident, *Reed v. Reed*, 404 U.S. 71 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. * * *"

III

THE COURTS BELOW CORRECTLY HELD THAT TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS INVALID AS CONSTITUTING A DEPRIVATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION.

The Court of Appeals and the Superior Court of the District of Columbia held that Title 18 §302 of the District of Columbia Code was unconstitutional under the Fifth Amendment. The courts below both found that the statute created an impermissible classification. It created two classes of beneficiaries, one class composed of clergymen and religious institutions and the second encompassing all other beneficiaries. The trial court determined that there is neither a compelling state interest or rational grounds justifying the statutory classification. The Court of Appeals concluded that the discriminatory treatment was invalid even under the "rational basis test." (Juris. State. App. A, p. 9a, footnote 9) Nothing set forth in appellants' brief requires a reversal of the holding of the courts below.

Appellants (Br., p. 9) correctly recognize that under *Bolling v. Sharpe* (1954), 347 U.S. 497, the equal protection clause of the Fourteenth Amendment is made applicable to the District of Columbia by the due process clause of the Fifth Amendment so that unjustifiable discrimination is prohibited by the due process clause. In *Bolling*, the Court found that racially segregated public schools in the District of Columbia violated the due process clause and stated:

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. * * * " Id at 499

Similarly, classifications based on religion are equally contrary to tradition and must be scrutinized with particular care. The classification here involved affects First Amendment rights which have traditionally been regarded as in a preferred position. *Murdock v. Pennsylvania, supra; West Virginia State Board of Education v. Barnette, supra; Follett v. McCormick* (1944), 321 U.S. 573. As pointed out above (p. 6) while governments have inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner,[5] it is only constitutionally permissible to do so if a compelling state interest requires the regulation. *Sherbert v. Verner, supra; West Virginia State Board of Education v. Barnette, supra; NAACP v. Button* (1963), 371 U.S. 415, 438; *Bates v. Little Rock* (1960), 361 U.S. 516.

The trial court determined that there was no compelling state interest which justified the infringement of First Amendment rights. The Court further pointed out that even assuming the purpose of the statute was to prevent the clergy and religious organizations from using undue influence on a testator nearing death, the state's interest could be served by creating a rebuttable presumption of undue influence with respect to a religious entity, which would alleviate the problem without infringing First Amendment rights. *Sherbert v. Verner, supra.* The trial court further found that there was not even a rational basis for the classification set forth in the statute. The Court of Appeals also determined that the classification of the statute had no rational relationship to the purpose of the statute and hence

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5 "* * * The conduct or action so regulated have invariably posed some *substantial* threat to public safety, peace or order." *Sherbert v. Verner, supra,* p. 403 (emphasis added).

denies religious legatees equal protection of the law. Having determined that the statute failed to meet the "rational basis" test, the court found it unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest. (Juris. State. App. A, p. 9a, footnote 9)

The statute in declaring bequests to religious organizations invalid under the same circumstances in which bequests to all other legatees, including charitable, education - al and other secular organizations, are permitted is an arbitrary classification and has a real, appreciable and detrimental effect on the free exercise of religion. Appellants' claim (Br., pp. 7, 9) that the statute has a very limited and indirect effect on religion and therefore does not regulate a fundamental interest protected by the First Amendment is beside the point. This Court has pointed out that in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents v. Roth, supra; Goss v. Lopez, supra.* Religious organizations, like business organizations and secular and charitable and educational organizations, need money and property to carry on their work. Religion relies solely on contributions and gifts. To prohibit the receipt of the bequests in thie case and thus deny the churches financial support is a violation of First Amendment rights. *Cantwell v. Connecticut, supra; Jamison v. Texas, supra; Murdock v. Pennsylvania, supra.* Infringement of constitutional guarantees is not a matter of degree. As the Court has stated in other circumstances[6] what "is today a trickling stream may all to soon become a raging torrent and, in

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[6] *Abington School District v. Schempp* (1963), 374 U.S. 203, 225.

the words of Madison, 'it is proper to take alarm at the first experiment on our liberties. ' * * * * " It would be difficult to conceive of a statute which has a more direct, real and appreciable effect respecting an establishment of religion or prohibiting the free exercise thereof than one proscribing devises or bequests to religious organizations.

The Court of Appeals pointed out that the issue in this case was considered by the Supreme Court of Pennsylvania with respect to the Pennsylvania Mortmain statute in *In re Estate of Cavill* (1974), 459 Pa. 411, 329 A.2d 503; and *In re Estate of Riley* (1974), 459 Pa. 428, 329 A.2d 511. The Pennsylvania statute invalidated *all* charitable gifts made within 30 days of the testator's death, unless those who would benefit by the invalidity agreed to the gift. The Supreme Court of Pennsylvania held the statute invalid as a denial of equal protection of the laws to the charitable beneficiaries. In the instant case, the Court of Appeals approved the reasoning of the Pennsylvania Court but found the District of Columbia statute to be perhaps more arbitrary than the Pennsylvania statute because it singled out religious devises and bequests, not all charitable bequests, and further it distinguishes between bequests to religious institutions and bequests to charitable organizations owned and operated by religious institutions, making only the bequests to religious institutions invalid. The purpose of the statutes, both the District of Columbia and Pennsylvania, is to protect the family of a testator who was unduly influenced by religious considerations. The *Cavill* opinion shows that the statute nullified bequests to charities even where the testator leaves no immediate family and would operate to benefit only distant relatives. The Court found this protection of a nonexistent "family" defeated the testator's express intent without any relation to the purpose which is sought to be promoted, "further demonstra-

ting the irrationality of the statutory classification." The District statute would not only nullify the testator's expressed intent and benefit distant relatives with whom testator may have had little contact during his life but would escheat to the District of Columbia if the testator had no living heirs. See Title 19 §701, D.C. Code. The Pennsylvania statute would presumably allow the bequests to be made to charitable organizations in the event that no next of kin were available to consent or object.

Appellants argue (Br., p. 9) that the D.C. statute regulates a secular activity, the testamentary transfer of property, and state that the statute is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. Assuming that this is true, it does not support appellants' cause. The constitutional point is that secular legislation must not infringe on the guarantees provided for by the First Amendment. Here the statute denies to churches the fundamental right to receive a bequest while permitting all other legatees similarly circumstanced the right to bequests. This denies the religious legatees equal protection of the laws. *Trimble v. Gordon*, ____U.S.____, 97 S.Ct. 1459 (decided April 26, 1977). This refutes appellants' assertions (Br., pp. 10, 11) that the statute does not regulate a fundamental interest protected by the First Amendment or that the statute constitutes no direct or substantial infringement of a fundamental constitutional right.

Appellants (Br., pp. 11-13) seem to argue that the "strict scrutiny" test is not applicable in this case because Title 18 §302 is in the nature of an economic regulation which states are accorded wide latitude in enacting. Appellants premise this argument on the assertion (Br., p. 11) that the D.C. statute "constitutes no direct or substantial infringement of a fundamental constitutional right." This is the issue in the case. The courts below found that the statute did infringe fundamental constitutional rights. The cases[7] relied on by appellants support appellees' position. The quotation by appellants (Br., p. 12) from the case of *City of New Orleans v. Dukes* (1967), 427 U.S. 297, states, in part, " • • • Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged by rationally related to a legitmate state interest. • • • " (Emphasis added) This quotation makes it clear that religion is a fundamental constitutional right and that no showing merely of a rational relationship to some colorable state interest is sufficient when First Amendment or fundamental constitutional rights are involved. *Cantwell v. Connecticut, supra; Sherbert v. Verner, supra;* see: *Police Department v. Mosely* (1972), 408 U.S. 92, 98-99.

Appellants (Br., pp. 13-14) argue that since the statute expresses a proscription, there is no denial of religious beneficiaries' right to be heard because they had no such right. Cited in support of this statement is *Board of Regents v. Roth, supra*. In that case, a nontenured college professor had been hired for a fixed term of one year. He was advised that he would not be rehired the next year but no

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[7] *Shapiro v. Thompson* (1969), 394 U.S. 618; *Dunn v. Blumstein* (1972), 405 U.S. 330; *Bullock v. Carter* (1972), 405 U.S. 134; *Frontiero v. Richardson* (1973), 411 U.S. 677; *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1; *Johnson v. Robison* (1974), 415 U.S. 361; *City of New Orleans v. Dukes* (1976), 427 U.S. 297.

reasons were given. He brought suit alleging, among other things, the failure of the University to give him notice of any reasons for nonretention and an opportunity for a hearing violated his right to procedural due process. The Court held that he had no right to a statement of reasons or to a hearing on the decision not to rehire him. This is clearly distinguishable from the present case where a testatrix has made bequests to religious legatees and a statute which is constitutionally challenged denies them the right to the bequests. Unlike the factual situation in *Doremus v. Board of Education* (1952), 342 U.S. 429, this proceeding involves "a good-faith pocketbook action" and constitutes "a direct dollar-and-cents injury." To say that the religious legatees have no right to be heard or any of the other guarantees of procedural due process in the light of the facts in this case is tantamount to saying the religious legatees are not entitled to the protection of the First and Fifth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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June 3, 1977

STATEMENT UNDER RULE 33(2) (b)

Since the proceeding draws into question the constitutionality of the Act of September 14, 1965, 79 Stat. 688, Pub. L. 89-183, §1, also known as Title 18 §302 of the District of Columbia Code, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

I hereby certify that a copy of this Brief for Appellee Calvary Baptist Church was served by first-class mail, postage prepaid, the 3rd day of June, 1977, on the Solicitor General, Department of Justice, Washington, D.C. 20530.

CARL F. BAUERSFELD
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APPENDIX

U.S. District Court

In Re: Small, Dist. Ct. D.C., Administration No. 2507-70, February 7, 1972. *Opinion* per Gesell, J. Joseph A. Rafferty for petitioner. Frank J. Delany for legatees.

GESELL, J.: The Court has before it a complaint for construction of the will of Madeleine B. Small, in which she left her estate in various parts to a series of Catholic religious institutions, and to various charitable institutions, including the Cancer Society, the Heart Association and the Montgomery County Society for Crippled Children.

She had no immediate next-of-kin or heirs-at-law. She had by prior will given substantial indication of her strongly-held religious inclinations. There is no evidence that any inappropriate influence was brought to bear upon her execution of her last will and testament; nor indeed is there any evidence before the Court that she even had any contact with the Catholic institutions to which she left her bequests.

The Executor, quite properly – whose final account would not have been approved until this matter was settled – has brought to the Court's attention the existence of Title 18, Section 302 of the D.C. Code, which provides with respect to devises or bequests for religious purposes as follows:

> "A devise or bequest of real or personal personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use or benefit thereof, or in trust therefor, is not valid unless it is made at least thirty days before the death of the testator."

This Will fell within the thirty-day period and, accordingly, the question presented for construction is whether the devises to admittedly religious sects and orders should be upheld or set aside; and if to be set aside, on what basis.

The statute just referred to is an anachronism peculiar to the District of Columbia which dates back to the early Nineteenth Century, at the time when the law with respect to the transfer of realty to church institutions was quite different and is in the nature of a Mortmain statute.

The Court is unable to find in the statute any justification which can withstand examination of the statute in the light of the First Amendment. Clearly the statute discriminates against religion. Many others would be in an equal position to influence a testator – lawyers, nurses, physicians, charitable organizations, and the like. The statute does not run to any such persons and, therefore, it cannot be said to be a statute which is designed to prohibit all bequests suggesting improper influence because made in the 30 days prior to execution of the will.

The difficulty with the statute, as the Court sees it, is that it singles out religion for particular treatment, without any justification. As counsel points out, if anything, religious institutions, where the Government interferes, are in a preferred position, but at least they should be in these circumstances in an equal position. I see no basis of compelling Government necessity or otherwise for the Government to interfere with religious practice, as the statute appears to do in its operation. The statute creates no mere presumption but creates an irrebuttable attack on the will which cannot, as the Court reads the statute, be ameliorated or modified by the facts and circumstances of any particular case: and as this case well illustrates, there are many

facts and circumstances that would operate against the statute if it were phrased in this instance merely as a presumption rather than an irrebuttable requirement.

Accordingly, the Court will direct that the will be constructed without regard to Title 18, Section 302, and that the bequests there made, if otherwise valid, should be carried out.

I am, of course, speaking only prospectively. I think it worth noting, however, that the courts of this jurisdiction have in a number of other cases sought by various types of judicial interpretation and perhaps almost legerde-main in a few cases to avoid the operation of the statute in spite of its express terms by attempting to identify the legatee as a charitable rather than purely religious donee. The First Amendment is now clearly defined in many cases, including cases brought to the Court's attention in the papers. The question of determining what acts of Government tend to interfere with religion falls well within what the courts have long been called on to do in this sensitive area and I think it is time this statute be identified for what it is and stricken.

[Court's oral ruling from the bench.]

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1057

Estate of

SALLYE LIPSCOMB FRENCH, JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

On Appeal from the District of Columbia Court of Appeals

MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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On Appeal From the District of Columbia
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MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned, as counsel for the American Jewish Congress, respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the appellees' position that the judgment of the District of Columbia Court of Appeals be affirmed.

Consent to the filing of this brief was obtained from counsel for the appellees but was denied by counsel for the appellant.

The American Jewish Congress is an organization committed to the safeguarding of the Bill of Rights in general, and specifically in this case to the First Amendment's dual guaranty of the separation of church and and state and the free exercise of religion. It has heretofore participated in many appeals before this Court, either as party or as amicus curiae, involving the interpretation and application of the Amendment.

We believe that our experience in dealing with the issues involved in this case enables us to contribute to the resolution by this Court of the important constitutional questions pending before it. Although we have not seen the briefs of the appellees herein, we believe that our brief supplements rather than duplicates theirs.

Wherefore, the amicus moves that the motion to file this brief be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1057

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JOHN W. KEY, et al.,
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v.

MICHAEL M. DOYLE, et al.,
Appellees.

On Appeal From the District of Columbia
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BRIEF OF AMERICAN JEWISH CONGRESS, AMICUS CURIAE

Interest of the Amicus

The American Jewish Congress is committed to the principle that the Constitution mandates complete neutrality in respect to the relations of government and religion. Government may not finance religious institutions out of tax-raised funds since that would constitute compulsory support of religion in violation not only of the Establishment Clause but also of the Free Exercise Clause of the First Amendment. Because of this commitment, the American Jewish

Congress has participated, either as party or as amicus, in many cases before this Court challenging laws appropriating tax-raised funds for the support of institutions practicing or teaching religion. It has asserted in all these cases that the First Amendment impels religious institutions to rely for their financial support exclusively upon the uncoerced contributions of their adherents.

We believe, however, that the Amendment forbids not only coercion to support religion but coercion not to support. A law, such as the one involved in this case, which allows a testator to leave his estate or part of it to any nonreligions organization he wishes but limits this right in respect to religious organizations manifests hostility to religion and unjustifiable discrimination against it.

We have participated in many efforts, legislative and executive as well as judicial, towards outlawing religious discrimination in employment, education, housing and public accommodations. It may be that, where such discrimination is practiced by individuals and nongovernmental bodies, it violates no constitutional prohibition. Where, however, it is practiced by government itself, we believe that it violates the Constitution. We are therefore impelled to express our opposition to it in all branches of our government, judicial no less than legislative or executive.

Statute Involved

Section 302 of 18 D.C. Code provides:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator.

The Question to Which This Brief is Addressed

The single question to which this brief is addressed is whether government, federal or state, can, consistently with the Establishment and Free Exercise Clauses of the First Amendment, invalidate testamentary bequests to religious institutions if made within thirty days of the testator's death.

Statement of the Case

The testatrix, Sallye Lipscomb French, executed her Last Will and Testament on October 13, 1972. She died less than 30 days thereafter on November 2, 1972. By the terms of the will, one-third of the residue was left to the Calvary Baptist Church, Washington, D. C., one-third to St. Matthew's (Roman Catholic) Cathedral, Washington, D. C., and one-third to Johns-Hopkins University, the last a secular institution. The decedents' heirs at law challenged the bequests

to the two religious institutions (but not the one to Johns-Hopkins) under the District's mortmain statute, 18 D.C. Code Section 302. The Superior Court of the District of Columbia held that the statute was invalid as constituting an unconstitutional infringement of the Free Exercise Clause of the First Amendment. Jurisdictional Statement, p. 8b.

The judgment of the Superior Court was unanimously affirmed by the Court of Appeals of the District of Columbia in an opinion by Associate Judge Mack holding that "the due process clause of the Fifth Amendment requires that the statute not be given effect in the administration of estates in the District of Columbia" in that it denies to religious testamentary beneficiaries the equal protection of the laws. Jurisdictional Statement, p. 9a. Retired Chief Judge Reilly concurred in an opinion asserting that the decision should have been based on the Religion Clauses of the First Amendment rather than the Due Process Clause of the Fifth. Jurisdictional Statement, pp. 9a - 10a.

Summary of Argument

I. The challenged statute violates the Establishment Clause of the First Amendment, whether that Clause is interpreted as the Court did in Everson v. Board of Education, 330 U.S. 1 (1947) and other cases, or whether it is interpreted as the Court did in Meek v. Pittenger, 421 U.S. 349 (1975) and other cases. It violates the Everson test because

it involves the government in religious affairs, influences profession of belief or disbelief in religion, and constitutes unneutrality between religion and non-religion. It violates the Meek test in that it has a primary effect of inhibiting religion.

II. The challenged statute also violates the Free Exercise Clause in that it effectively restricts both the right of persons to leave property to religious institutions as required by their religious conscience and the right of religious institutions to receive such bequests. While no freedom secured by the First Amendment is or can be absolute, the burden of justifying the validity of a law infringing upon First Amendment freedoms, and particularly freedom of religion, is a substantial one and rests upon the party defending the law. That burden has not been met in this case.

ARGUMENT
POINT I

THE MORTMAIN STATUTE CHALLENGED IN THIS CASE IS AN UNCONSTITUTIONAL LAW RESPECTING AN ESTABLISHMENT OF RELIGION.

A. Preliminary Statement

The term "mortmain" is generally used to denote the alienation of lands or tenements to any nonprofit or charitable corporation, ecclestiastical or temporal. Mortmain acts had as their purpose the prevention of accumulation of lands by primarily religious corporations. Blackstone, in explaining

these acts, noted that, "as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those who, according to the superstitions of the times, could intercede for their happiness in another world." Commentaries on the Laws of England (Beacon Press (1962 ed.)), p. 347.

It is important to note initially that this case does not involve the constitutionality of all mortmain statutes still in force in the United States, but only that of the District of Columbia, which appears to be unique in this country. As indicated in the opinion of the Court of Appeals (Jurisdictional Statement, p. 4a, footnote 2), seven other jurisdictions still have statutes similar to the one challenged in the present case, but only the latter restricts testamentary gifts to religious institutions; the others restrict substantially all charitable gifts made within a certain period before death. In this brief, we take no position on the validity of mortmain statutes generally but only upon the statute here in issue which singles out religious institutions as ineligible testamentary beneficiaries.

It should also be noted that the challenged statute makes no distinctions in respect to the age of the testator, his mental capacity at the time of death, or the manner of his death. It applies equally to the will of the superannuated and to that of a person in his thirties or forties in full possession

of his mental faculties who suffers accidental and unforseeable death within thirty days after executing a will.

Finally, it should be noted -- a point to which we will return in Part II of this brief -- that the invalidation of the challenged statute in no way limits the right of disappointed heirs to challenge the validity of the decedent's will on the ground that decedent at the time the will was executed was in actual fact not of sound mind or was the subject of undue influence.

B. The Everson Test and Neutrality

In Everson, the Court said (330 U.S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may adopt to teach or practice

> religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

This careful exposition of the meaning of the constitutional clause was repeated and reaffirmed in McCollum v. Maryland, 333 U.S. 201 at 210 - 211 (1948); McGowan v. Maryland, 366 U.S. 420 at 443 (1961) and Torcaso v. Watkins, 367 U.S. 488 at 492-493 (1961).

We submit that the District's mortmain statute cannot stand under the Everson test. It is a law respecting an establishment of religion as that constitutional provision was interpreted in the Everson and other cases. It involves the government in religious affairs for it decides what an individual may or may not give to a religious institution and when he may or may not give it. It forces a testator to profess a disbelief in any religion, or at least prevents him from expressing a belief in religion through making a contribution to it that takes effect upon his death. Above all, it violates the mandate of neutrality between religion and non-religion.

It is noteworthy that in all the cases in which this Court applied the Everson test

in whole or in part, [1] the challenged statutes were asserted to be in aid of religion. This was so because, as has often been noted, the American people and their governmental bodies have been friendly rather than hostile to religion. See, e.g., Zorach v. Clauson, 343 U.S. 306 at 313-314 (1952); Board of Education v. Allen, 392 U.S. 236 (1968). In all these cases, however, the Court has interpreted the Establishment Clause of the First Amendment to mandate neutrality as to religion, not hostility. As it said in Everson (330 U.S. at 18):

> That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

There have been many cases in which the Court was called upon to pass judgment on governmental action, legislative, executive or judicial, against a particular unpopular sect such as the Mormons or Jehovah's Witnesses. See, e.g., Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Cantwell v. Connecticut, 310 U.S. 296 (1940). In addition, it has considered (but consistently rejected) claims that judicial decisions invalidating Bible reading or prayer

1. See, eg.g., Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, at 780 (1973).

recitation in the public schools or governmental aid to parochial schools are unneutral and hostile to religion in general.[2] There appears, however, to have been only one case in which this Court was called upon to decide whether enforcement of the terms of a decedent's will restrictive of religion would manifest government hostility to religion and, hence, under the Everson test, would today constitute a violation of the Establishment Clause.

That case was Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844), in which the Court was called upon to decide the validity of a will in which the testator bequeathed a substantial estate for the purpose of establishing an educational institution for orphans, with the proviso, among others, that "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated for the purposes of the said college." Girard's heirs attacked the will and argued, in the words of their attorney, Daniel Webster, that the "plan of education is derogatory to the Christian religion, tending to weaken men's respect for it and their conviction of its importance. It subverts the only foundation of public morals, and therefore, it is mischievous and not desirable" (Ibid at 173). The Court rejected the con-

2. See, e.g., McCollum v. Board of Education, 333 U.S. 203, at 212-213 (1948).

tention and, translated into contemporary constitutional concepts, held that the state's enforcement of the will was consistent with judicial mandates of neutrality.

The present case is the converse of Vidal. It is not the decedent's testament but the statute of the District of Columbia which seeks to exclude religious institutions as beneficiaries in her estate. The constitutional principle, however, is the same: as the law may not compel inclusion of religious institutions as beneficiaries of a decedent's estate, neither can it compel their exclusion.

C. The Purpose-Effect-Entanglement Test

In a number of cases, traceable to McGowan v. Maryland, 366 U.S. 420 (1961), and culminating as of the present writing in Meek v. Pittenger, supra, the Court evolved what has become known as the purpose-effect-entanglement test of validity upon the Establishment Clause. See, Abbington School District v. Schempp, 374 U.S. 203 (1963); Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education and Religious Liberty (PEARL) v. Nyquist, 413 U.S. 756 (1973). This three-part test for validity was expressed as follows in Meek v. Pittenger (421 U.S. at 358):

> First, the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion.

The purpose-effect-entanglement test is not a repudiation of the Everson test, as is evidenced by the fact that practically every decision of this Court which refers to and applies the former test also cites Everson. Basically, it is neither more nor less than a re-phrasing of the essential elements of the Everson test. In any event, whatever the case may be, the District's mortmain statute can no more survive challenge under the later formulated test than it can under the earlier Everson test.

Limiting ourselves to the second of the three-prong purpose-effect-entanglement test, it is clear that whatever may have been the purpose of those who formulated and promulgated the first mortmain law (although it can hardly be doubted that their purpose was to inhibit the acquisition of wealth by churches), or of those who adopted the statute here in issue, that statute does have a primary effect that inhibits religion. It inhibits the religion of the testatrix which impels her to make the challenged bequests, mandated as they are by her religious conscience; and it inhibits the religion of the ecclesiastical beneficiaries in that it deprives them of moneys committed to them for the preservation and propagation of their respective religions. As such, we submit, it cannot survive challenge under the purpose-effect-entanglement test.

POINT II

THE MORTMAIN STATUTE CHALLENGED IN THIS CASE IS AN UNCONSTITUTIONAL LAW PROHIBITING THE FREE EXERCISE OF RELIGION.

A. Preliminary Statement

Initially, we note that there may be instances where the ban on laws respecting an establishment of religion and those prohibiting its free exercises are or appear to be in conflict with each other. See, e.g., Walz v. Tax Commission, 397 U.S. 644 (1970); Wisconsin v. Yoder, 406 U.S. 205 (1972). Whether or not these cases present real conflict is by no means certain but, if they do, they constitute the exception rather than the rule. Those who wrote our Constitution and Bill of Rights conceived the separation of church and state and religious freedom as a unitary principle. To them, notwithstanding occasional instances of apparant conflict, separation guaranteed freedom and freedom required separation. The decisions of this Court confirm that conclusion; in the great majority of cases, the dual guaranties of the Amendment support rather than conflict with each other. See, e.g., Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Torcaso v. Watkins, 367 U.S. 488 (1961). The present case is one of these.

We note further that it is entirely irrelevant to the determination of the constitutional issues raised in this case whether either the bequeathing of property or the receipt of it by will is a right or a

privilege (see Irving Trust Co. v. Day, 314 U.S. 556 (1942)). The First Amendment makes no distinctions between rights and privileges. Governmental exclusion of a person from a class entitled to benefits because of his religion violates the Free Exercise Clause whether that benefit be designated a right or a privilege. Torcaso v. Watkins, 367 U.S. 488 (1961). As the Court said in Sherbert v. Verner, 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." If, as in Torcaso, a person may not be constitutionally barred from becoming a notary public because of his religion or lack of it or, as in Sherbert, barred from receiving unemployment insurance benefits because of his refusal to violate his religious beliefs by working on his Sabbath, he cannot be barred from bequeathing or inheriting property because of his religious beliefs or practices.

B. The Meaning of Free Exercise

Just as during the past decade there has been a reformulation of the meaning of the Establishment Clause so has there been a reformulation of the meaning of the Free Exercise Clause. Here too the reformulation was not intended to and did not lessen the protection accorded to religious freedom. Indeed, if there is any difference in substance between the earlier and later formulation it is clear that the later one accords a greater degree of protection to the free exercise of

religion.

In the earlier cases, the Court applied to challenges under the Free Exercise Clause the same test applicable to the Free Speech Clause; that is, the clear and present danger test. It was recognized that the religious freedom guaranteed by the First Amendment did not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940). The First Amendment did not preclude proscription of polygamy, breaching of the peace, or child labor. Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944).

Nevertheless, when the Court considered the validity of legislation regulating rights secured by the First Amendment, it did not apply the usual presumption of constitutionality. It recognized rather, "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 530 (1945); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Prince v. Massachusetts, supra, 321 U.S. at 164. Hence, "any attempt to restrict these liberties must be justified by clear public interest threatened not doubtfully or remotely, but by clear and present danger." Thomas v. Collins, supra, 323 U.S. at 530. See also West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624 at 639 (1943).

More recently, beginning with Sherbert v. Verner, supra, the Court in First Amendment cases has spoken in terms of compelling interest. Like the clear-and-present danger test, the compelling-interest test is based on the premise that the liberties protected by the First Amendment are fundamental in our constitutional democracy and therefore stand in a preferred position in our scale of values. Hence, as the Court said in Sherbert, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

The trend of the Court's decisions in applying the compelling interest test has been toward broad interpretation and application of the Free Exercise Clause.[3] Thus, in Sherbert, the Court held that a denial of unemployment benefits because of a woman's refusal to accept a position that required her to work on Saturday, violated the Free Exercise Clause. In the case of In re Jenison, 375 U.S. 14 (1963), it held that a woman whose conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L. Rev. 1115 (1973).

Clause, be held in contempt of court. And in Wisconsin v. Yoder, supra the Court held that the Free Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious conscience would not allow them to send their children to secondary schools. In the latter case, the Court summarized its earlier decisions as establishing (at 215): "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

In sum, under the present interpretation of the Free Exercise Clause, government, state or federal, can restrict the expression or exercise of religion only by showing (1) that there is a counter governmental interest of such importance as to be deemed compelling and (2) that there is no alternative for its protection other than the limitation on the free exercise of religion.

We submit that, however the test is formulated, the challenged statute cannot be upheld under the Free Exercise Clause. It is invalid under that Clause both as to the testatrix and as to the religious beneficiaries. It effectively restricts the right of persons to leave property to religious institutions as required by their conscience and the right of the latter to receive such bequests. While no freedom secured by the First Amendment is or can be absolute, the burden of justifying the validity of a law restricting the free exercise of religion rests upon the party defending it. The

obligation of justifying the challenged mortmain statute has not been met in this case.

C. Validity as to the Testatrix

As we have noted, the invalidation of the mortmain statute in no way limits the right of disappointed heirs to challenge the validity of the decedent's will on the ground that, at the time of its execution, she was not in actual fact of sound mind or in full command of her mental capacities. Nor does it limit the right of the heirs to establish that the religious beneficiaries did in fact exercise undue influence upon her, as that term is understood in respect to testamentary dispositions to beneficiaries other than churches.

It can hardly be doubted that a testamentary disposition of property to a church is an exercise of religion within the meaning of the First Amendment. What clear and present danger warrants infringement upon this freedom? What counter governmental interest is of such importance as to be deemed compelling? What showing has been made that, if such an interest exists, it cannot be protected by means other than the limitation on the decedent's free exercise of her religion?

The District statute, unlike other mortmain laws, singles out religious institutions or personnel as disqualified legatees. This fact indicates that the framers of the law believed that, even in absence of proved undue influence, a person on his death bed would be so concerned about his rewards and

and punishments in a future life that efforts to purchase entry into heaven or avoid consignment to hell must as a matter of law render him legally incompetent to make a full disposition of his estate as he sees fit. Presumably, the assumption is that, while such a prediction of afterlife may be valid if made more than thirty days before death, it is vulnerable if made within that period.

But what if the testator is right and the lawmakers wrong? Can the state then redeem him from hell? If there is anything the First Amendment forbids, it is governmental determination as to which religious beliefs are true and which false. The government may not determine, for example, that saluting the flag is really not a form of idolatry forbidden by the Bible and that engaging in the practice would not result in an afterlife in hell. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). By the same token, it may not adjudge that contributions to a particular church or religion will not purchase a happy afterlife.

That is what this Court held in United States v. Ballard, 322 U.S. 78 (1944), setting aside a conviction for obtaining property under the false pretense that a happy after-life could be purchased by contributions to the defendants' church. Particularly apposite to the present situation is the following from the Court's opinion in that case (322 U.S. at 86-67):

> ...Heresy trials are foreign to our Constitution. Men may believe what

they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedoms...

In his monumental Virginia Act for Establishing Religious Freedom, Jefferson stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical" and a denial of "one of the natural rights of mankind." So, too, we suggest, is compelling him not to furnish contributions for the propagation of opinions in which he does believe.

D. Validity as to the Churches

The second justification for mortmain laws - the only one that the believing

generations which originated these laws could acknowledge - is the prevention of excessive accumulation of property and wealth by churches. Such accumulation, it is feared, by withdrawing substantial properties from the tax rolls under the tax exemption privilege enjoyed by churches, either deprives the government of needed revenue or results in an inordinate burden on the non-exempt property owners.

In may be conceded that this explanation might provide prima facie justification for the distinction made in the challenged statute between testamentary contributions to churches and those to nonreligious philanthropic institutions. In respect to the latter, the testamentary bequests relieve the government in part of its burden in financing nonreligious charitable, scientific or educational services or institutions, whereas the Establishment Clause forbids the government to practice religion or finance religious institutions. In Walz v. Tax Commission, 397 U.S. 664 (1970), however, the Court noted that many if not most churches do engage in substantial nonreligious charitable functions such as providing hospital care for the poor. While this fact was not used by the Court as constitutional justification for tax exemption to churches, it does furnish support for the claim that the state may not interfere through mortmain laws with the efforts of churches to obtain funds necessary for providing these religiously neutral charitable services.

The difficulty with the justification of mortmain laws as a means to prevent excessive accumulation of properties by churches is that it is simultaneously too broad and too narrow. It is too broad because it encompasses testamentary bequests equally to poor and to rich churches. As Anatole France noted, it is only superficial justice which impartially forbids both the poor and the rich to sleep under bridges. It is too narrow because it is limited to testaments executed within thirty days of death. If there is a valid fear of excess accumulation of wealth by churches, the appropriate means of meeting the problem is forbidding accumulation above prescribed limits, no matter how or when that accumulation is effected.

Finally, the difficulty with this justification for mortmain laws is that, even to effect a legitimate end, the Constitution imposes on government a mandate to utilize means which least infringe upon constitutionally protected rights. In the Walz case, the Court upheld the constitutionality of tax exemption for churches, but neither in that decision nor in any other did it intimate that the Constitution forbids nondiscriminatory taxing of the property of churches, or at least their income-producing business property. Cf. Diffenderfer v. Central Baptist Church of Miami, 404 U.S. 412 (1972). Indeed, as to the latter, many if not most states do in fact, impose such taxes. See

ibid.[4] It is one thing to require churches to pay these taxes as everybody else does; it is another, and completely inconsistent thing to preclude churches from acquiring moneys and properties as everybody else does. It may be that, given the choice, some churches

4. As noted in the following from the Religious News Service of May 29, 1969, the organizations most representative of Protestant, Catholic and Jewish religious opinion favor denial of tax exemption on the income-producing properties of religious organizations:

> The National Council of Churches, composed of 33 Protestant and Orthodox Churches, and the Roman Catholic bishops of the U.S. have asked the federal government to end church tax exemption on income received from businesses unrelated to religion.
>
> The unprecedented move was announced here and in Washington, D.C., and sent to the House Ways and Means Committee, now writing draft legislation on tax reforms...
>
> The request to the government came after several months of negotiations involving Catholic and NCC leaders, in consultation with the Synagogue Council of America. The Jewish organization, composed of all three major branches of Judaism in the nation, was expected to consider approval in early May.

would opt for continued tax exemption rather than nullification of mortmain laws, but that fact is hardly material in passing upon the constitutionality of such laws. What is material is that nondiscriminatory taxation of business property of churches does not violate the Free Exercise Clause but discriminatory deprivation of the right to acquire such property by will does.

Conclusion

For the reasons set forth, the judgment appealed from should be affirmed.

Respectfully submitted,

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